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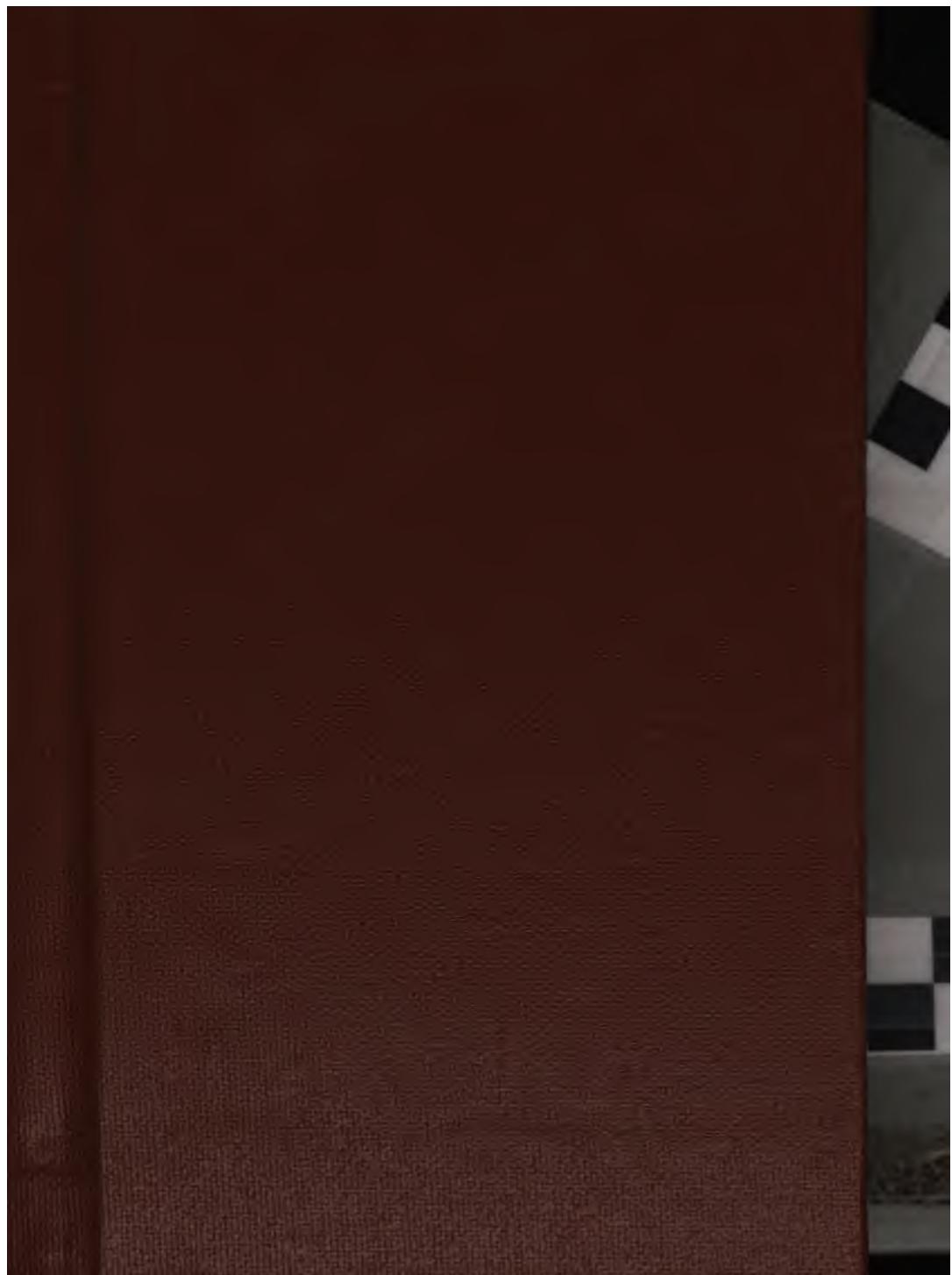
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# THE ELECTION OF SENATORS

BY

GEORGE H. HAYNES, PH.D.

Professor of Political Science in the Worcester Polytechnic Institute;  
Author of "Representation in State Legislatures"



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УРАЖАЛ СЛОВАЧІ

TO  
**A. B. B.**



## PREFACE

THE present position of the United States Senate is one of strange contradictions. Never before has it been at once so berated and so extolled. The press teems with denunciations of the "usurpations" by which, it is alleged, the Senate has encroached upon the most distinctive powers of the President and of the House, arrogating to itself the appointment of officers and the making of treaties, and taking from the direct representatives of the people the power of the purse. On the other hand, in these days of centralization and expansion, if not of socialism, men of conservative temper find their chief ground for reassurance in the belief that upon the Senate, if upon nothing else, we may rely to restrain the expanding powers of the Executive, and to check the raw haste and partisanship of the rule-ridden House. Between the critics, hostile and friendly, there is one point of agreement: the acknowledgment that the Senate has become the dominant branch of Congress, the controlling influence in the government.

Whether the Senate be regarded as the sheet anchor of the republic in the troubled seas of democracy, or as the stronghold of corporate interests—as the country's only safeguard, or as its chief menace—the question becomes one of paramount importance: how do men come to their membership in this overpowering



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# THE ELECTION OF SENATORS

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## CHAPTER I

### HOW SENATORS CAME TO BE ELECTED BY STATE LEGISLATURES

THE gravest problems which confronted the members of the Federal Convention in 1787 related to the composition and powers of the law-making body. The record of American legislatures up to this time furnished little else than warnings. The Continental Congress had exercised mighty powers, so long as the exigencies of the war made them necessary; but, as the end of the struggle drew near, that body had suffered a lamentable decline, both in personnel and influence. When, by the Articles of Confederation, this revolutionary legislature was replaced by a congress standing upon a constitutional basis, a few months' experience sufficed to show that the law-making body was ill devised, and that, if the new government was to preserve order at home and secure and retain respect abroad, it must be made more thoroughly representative, and its powers must be greatly extended. A scheme for a more effective legislature, therefore, the members of the Fed-

eral Convention had to devise, and its norms they had to seek either in theory or in the practice of the various American States. Few and of doubtful service were the models suggested by foreign countries, and no precedent at all existed for the legislature of a great federal state.

The very first question relating to the structure of the new government, to which the Convention gave its attention, had to do with the make-up of the legislature. Should it consist of one house, or of two? In 1787, it had by no means become an axiom that legislative bodies should be bicameral. Both the Continental Congress and the Congress of the Confederation had consisted of but a single chamber. In the States, too, recent constitution-making—the readiest source of precedents—had produced three unicameral legislatures; and, although Georgia and Pennsylvania were on the eve of dividing their legislatures, Vermont was to retain the single chamber for half a century. In the Federal Convention, however, it is significant, the plans of government of Randolph and Pinckney, submitted at the very opening of the Convention's work, both provided for a bicameral legislature. And when, on the 31st of May, a resolution was presented that the national legislature ought to consist of two branches, it was agreed to in committee of the whole, without debate or objection, except from the Pennsylvania delegation—opposition that Madison attributed to “complaisance to Dr. Franklin, who was understood to be partial to a single house of legislation.”<sup>1</sup>

<sup>1</sup> Like other matters which were to enter into the Constitution, this recommendation of the bicameral legislature was first taken

On the very day when it was determined that there should be a second branch of the legislature, debate turned to the question how the members of the upper house should be chosen.<sup>2</sup> The state constitutions furnished diverse and in a degree contradictory suggestions. In general, however, a decided intent to secure in the upper chamber a conservative, if not an aristocratic, check upon the popular branch was evident. Qualifications were often prescribed which aimed to

up in the "committee of the whole House to consider the state of the American Union," and later was passed upon formally by the Convention. Despite this agreement, which at the outset virtually committed the framers of the Constitution to approval of the bicameral system, the debates of the Convention show that its members canvassed the various arguments usually advanced in favor of a second chamber. They made much of the need of deliberation, of the danger that might arise from the impulsiveness of a single chamber, and of the probability of its coming to use its powers autocratically unless it felt the restraint of a potent check in some coördinate chamber. Nor did they fail to cite the precedents in favor of bicameral legislatures afforded by the several States and especially by the British Parliament. Yet, it cannot be doubted that the Convention's prompt acceptance (on June 21) of the bicameral system by the decisive vote of seven States to three, was determined hardly so much by theoretical considerations or by historical precedents as by the fact that this form of legislature bade fair to help reconcile the interests of the large and small States.

<sup>2</sup> The course of the debate upon the election of senators is best to be followed in the *History of the Constitution*, published by the authority of Congress; in the *Journal of the Federal Convention*, in the fifth volume of *Elliot's Debates*; or in *Gilpin's Papers of James Madison*, especially pages 812-821. A brief narrative of the discussion upon this question is to be found in Bancroft's *History of the United States*, Vol. 5, pp. 226-227. A far more painstaking and detailed account of the discussion is presented in William M. Meigs's *The Growth of the Constitution in the Federal Convention of 1787*, pp. 68-80.

secure men of more mature age in the Senate than in the House; and several of the States insisted that the senators be men of greater wealth than the representatives. New Hampshire and South Carolina had begun by having senators elected by the members of the lower house; but both had given up this method before the Convention met. Maryland sought to secure a higher grade of senators by having them chosen by a special college of electors, selected for that purpose by the people—a device which served as the model for the electoral college provided by the Constitution for the election of President, and for a similar body by which, for a few years, the Kentucky Senate was chosen.

With this slight and unsatisfactory experience before them, the members of the Federal Convention gave careful consideration to four methods of choosing senators. These were: (1) appointment by the national executive; (2) election by the people; (3) election by the lower branch of the national legislature; and (4) election by the state legislatures.<sup>8</sup>

Gouverneur Morris was the chief advocate of the appointment of senators by the President. In order to have them independent, he urged, they should serve for life and without compensation. He deemed it desirable that the Senate be made up of men of great and established wealth, that thus they might keep down “the turbulency of democracy;” for, he declared, all the guards contrived by America had not restrained the senatorial branches of the state legislatures from ser-

<sup>8</sup> For the most part, the discussion of the process of electing senators was confined to two or three days, during which it formed the subject of spirited debate—May 31, June 7, and 12.

vile complaisance to the democratic lower houses. George Read, also, contended that the Senate should be appointed by the executive out of a proper number of persons to be nominated by the state legislatures. But no one else supported this proposal, and Gerry characterised it as "a stride toward monarchy that few will think of."

At the other extreme, direct election by the people found an earnest advocate in James Wilson. With great earnestness he insisted that the national Senate ought to be independent, both of the state legislatures and of the first branch of Congress. He urged that men of intelligence and uprightness were most likely to be secured by following New York's method of choosing her state senators; namely, by uniting several of the election districts for the lower branch into large districts, each of which should elect one senator—a device similar to that which now obtains in the election of the Illinois and Minnesota legislatures. But popular election met with strong opposition. Even in the debate over the method of choosing members of the lower house, Pinckney had asserted that an election of either branch by the people, scattered as they were in many States, particularly in South Carolina, was totally impracticable. Roger Sherman opposed popular elections on more radical grounds. He declared: "The people immediately should have as little to do as may be about the government. They lack information, and are constantly liable to be misled." Gerry, too, asserted that the evils they experienced flowed from the excess of democracy; and he contended repeatedly that "to draw both branches of the legislature from the people

would leave no security to the latter [the commercial] interest; the people being chiefly composed of the landed interest, and erroneously supposing that the other interests are adverse to it." In illustrating the people's lack of information and of restraint, both Gerry and Pinckney declared that, in their respective States, the minority were in favor of paper money as a legal tender, while the legislatures were opposed to it; and both observers attributed this difference to the fact that the legislatures had "more sense of character and would be restrained by that from injustice." In a test vote, which involved the principle of popular elections, Pennsylvania, James Wilson's State, alone voted in its favor.

Neither executive appointment nor direct popular election, therefore, proved satisfactory to the members of the Convention. Madison seems to have voiced the prevailing opinion when he declared himself "an advocate for the policy of refining the popular appointment by successive filtrations." Admitting that this might be pushed too far, he said that he wished the expedient to be resorted to only in the appointment of the second branch of the legislature, and in the executive and judicial branches of the government. Every one of the more elaborate plans of government presented to the Convention proposed some process of indirect election for the Senate. Thus, Hamilton wished the Senate to consist of persons elected to serve during good behavior by electors chosen for that purpose by citizens who had, either in their own right or in that of their wives, an interest of at least fourteen years in landed estate. But to choose a special set of electors seemed a worse than

useless complicating of the governmental machinery, provided this choice of senators could as well be performed by some body of electors already convened. Hence the choice narrowed itself down to one or other of two such bodies, as an electoral college.

The plans of government of both Randolph and Pinckney provided that "the members of the second branch be chosen by those of the first," or, in modern terms, that senators should be selected by members of the House of Representatives, and, as Randolph added, "out of a proper number of persons nominated by the individual legislatures." This last provision was retained in committee, by the vote of nine States; but the whole proposal, for the election of senators by the first branch out of nominations by the state legislatures, was presently rejected by a vote of seven to three, only Massachusetts, Virginia and South Carolina being recorded in its favor. Indeed, it commanded hardly any support, Gerry expressing the general opinion when he said that it would create a dependence contrary to the end proposed.

Gradually the consensus of opinion settled upon an election of senators by state legislatures. On the very first day of the debate this method had been proposed by Spaight of North Carolina; but this motion was later withdrawn, for equality of state representation had not then been decided upon. James Wilson, the sole advocate of direct election by the people, was prompt in his opposition. He insisted that if one branch of Congress should be chosen by the legislatures and the other by the people, the two would rest on different foundations, and that dissensions would arise between them. More-

## 8            The Election of Senators

over, he held that it was wrong to increase the weight of the state legislatures by making them the electors of the senators; he believed that all interference between the general and the local governments should be obviated as much as possible. He declared that on examination it would be found that the opposition of the States to federal measures had proceeded much more from the officers of the States than from the people at large.

Outspoken opposition to the choice of senators by the state legislatures, it should be noted, therefore, was confined to this one man. On the other hand, hardly any proposition before the Convention brought forward so many members to speak in its favor. There was little heat in the debate; it was simply a testifying to the merits of the scheme by those who believed in it. The original motion was made by John Dickinson on the 7th of June; it was seconded by Roger Sherman. The arguments which it called forth covered a multitude of points, but they followed four main lines.

In the first place, it was contended, election by legislatures would secure a higher grade of senators. It was hoped that this "filtration" of the election through the legislatures—they having, as was asserted, "more sense of character" than the people at large—would give a refinement to the choice; so that, as the author of the original motion put it, the Senate would consist of the most distinguished characters, distinguished for their rank in life and their weight of property, and bearing as strong a resemblance to the British House of Lords as possible. He thought such characters more likely to be selected by state legislatures than by any

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other mode. A number of members, to whom this British model may not have appealed, laid emphasis upon the fact that the people would be less fit judges in a case of this kind, and insisted that legislative election would be the method best calculated to confer upon the Senate the most desirable qualities of permanence and independence, inasmuch as this mode "would avoid the rivalships and discontents incident to the election by districts." Gerry, the most determined opponent of popular elections, nevertheless favored having the people nominate certain persons from certain districts, out of which number the state legislature should make the appointment.\* From the fact that in some States one branch of the legislature was somewhat aristocratic, he argued that there would therefore be a far better chance of refinement in the choice.

In the second place, it was contended that the election of senators by the state legislatures would give a more complete, a more effective representation. As Dickinson urged, the sense of States would be better collected through their governments than immediately from the people at large. Others advocated an election of representatives by the people and of senators by the States, since by this means the citizens of the States would be represented both individually and collectively. In the legislature, diverse interests would be voiced, and it was felt that the senator, elected thus, would feel himself less the representative of class or of factional interests. It was from this point of view that Gerry

\* A recent writer has urged a similar proposal with much force, *infra*, pp. 149, 150. W. P. Garrison, "The Reform of the Senate," in *Atlantic Monthly*, Vol. 68, pp. 227-234 (August, 1891).

contended that the commercial and moneyed interests would be more secure in the hands of the state legislatures than of the people at large, and Madison insisted: "The Senate will seasonably interpose between impetuous counsels, and will guard the minority, who are placed above indigence, against the agrarian attempts of an ever-increasing class who labor under all the hardships of life and secretly sigh for a more equal distribution of its blessings." Although Madison approved of a "filtration of the choice" as applied to the Senate,<sup>5</sup> he seems to have had no enthusiasm for elec-

<sup>5</sup> Inasmuch as, in recent years, advocates of the election of senators by the people have been in the habit of referring to Madison as the advocate of that system in the Convention, it will be well to examine his words with care, for the Convention had no member of more judicial mind or of wider information as to the theories and the practical workings of governments. Madison approached the question of the constitution of the Federal Legislature without prejudgment. "The true question," he insisted, "was in what mode the best choice would be made." It is true that he was an outspoken advocate of representation according to population and direct election by the people as applied to the lower house. But, as has been stated, he explicitly declared himself "an advocate for the policy of refining the popular appointment by successive filtrations," and he made express mention of the "second branch of the legislature" as one of the bodies to the appointment of whose members he would have such "filtration" restricted. He accepted choice by state legislatures without enthusiasm. "If an election by the people or through any other channel than the state legislature promised as uncorrupted and impartial a preference of merit, there could surely be no necessity for an appointment by those legislatures. Nor was it apparent that a more useful check would be derived through that channel than through some other." A few days later he said: "It was to be much lamented that we had so little direct experience to guide us. The Constitution of Maryland was the only one that bore any analogy to this part of the plan.

tion by state legislatures; indeed, upon this point he offered pungent criticism: the great evils complained of, he said, were that the state legislatures ran into schemes of paper money, and the like, whenever solicited by the people. Their influence, then, instead of checking a like propensity in the national legislature might be expected to promote it, for nothing could be more contradictory than to say that the national legislature, without a proper check, would follow the example of the state legislatures, and, in the same breath, that the state legislatures were the only proper check. James Wilson spoke in similar vein, and received no answer, when he asked: "If the legislatures, as was now complained, sacrificed the commercial to the landed interest, what reason was there to expect such a choice from them as would defeat their own views?"

It was also hoped that the different modes of representation in the House and in the Senate would make

In no instance had the Senate of Maryland created just suspicions from it. In some instances perhaps it may have erred in yielding to the House of Delegates. In every instance of their opposition to the measures of the House of Delegates they had had with them the suffrages of the most enlightened and impartial people of the other States as well as of their own. In the States where the senates were chosen in the same manner as the other branch of the legislatures, and held their seats for four years, the institution was found to be no check whatever against the instability of the other branches."

It is clear, therefore, that Madison felt convinced that, for the upper branch of Congress, election by state legislatures gave promise of the best results attainable, and that he supported his view by the sole available American precedent; while, on the other hand, he cited the prevalent experience of state legislatures to prove that the chief advantage of an upper house would be lost if it should be chosen in the same way as the lower, i.e., by the direct vote of the people.

them serve as a mutual check. In defending the Constitution before the South Carolina convention, Pinckney laid strong emphasis upon this point. The House of Representatives, he insisted, would be elected immediately by the people and would represent them and their personal rights individually; the Senate would be elected by the state legislatures and represent the States in their political capacity; and thus each branch would form a proper and independent check upon the other, and the legislative power would be advantageously balanced.

Moreover, it was felt that choice by the legislatures would be of beneficial effect upon the relations between the state governments and the national government. In seconding the proposal for legislative election of senators, Sherman admitted that national and state governments ought to have separate and distinct jurisdictions, but he insisted that they ought to have a mutual interest in supporting each other; and he believed that by this method of choosing senators the particular States would thus become interested to support the national government, and that a due harmony between the two governments would be maintained.\* Furthermore, it was urged by Colonel Mason<sup>7</sup> that,

\*On the other hand, Read declared: "Too much attachment is betrayed to the state governments. We must look beyond their continuance, as the national government must soon of necessity swallow them all up. They will soon be reduced to the mere office of electing the national Senate."

<sup>7</sup>Under date of June 7, 1787, Rufus King quotes George Mason as follows: "We have agreed that the national government shall have a negative in the acts of the state legislatures; the danger now is that the national Legislature will swallow up legislatures of the States. The protection from this occur-

as in every other department there had been studious endeavor to provide for its self-defense, so “the state legislatures ought to have some means of defending themselves against the encroachments of the national government. And what better means can we provide than the giving them some share in, or rather to make them a constituent part of the national establishment?”<sup>8</sup> Finally, it was felt that not only would the legislatures, if excluded from a participation in the national government, be more jealous and more ready to thwart it, but also—a most timely and important consideration—that they would be less likely to promote the adoption of the new Constitution.<sup>9</sup>

When, after protracted discussion in committee of the whole, the vote was taken upon the motion for election of the Senate by the state legislatures, ten States voted in its favor and not a single one recorded itself

rence will be the securing to the state legislatures the choice of the senators of the United States.”—*Life and Correspondence of Rufus King*, Vol. 1, p. 597.

<sup>8</sup> Inasmuch as Mason has frequently been quoted as an advocate of the popular election of senators in the Convention this argument of his should be particularly noted. Like Madison, he advocated direct popular election of representatives, not of senators.

<sup>9</sup> “It should be remembered, too, that this is the same manner, in which the members of Congress are now appointed; and that herein, the sovereignties of the States are so intimately involved, that however a renunciation of part of these powers may be desired by some of the States, it *never* will be obtained from the rest of them. Peaceable, fraternal and benevolent as these are, they think the concessions they have made ought to satisfy all!”—John Dickinson, *Letters of Fabius*, No. II.; *The Federalist and Other Constitutional Papers*, edited by E. H. Scott, Vol. 2, p. 784.

in opposition.<sup>10</sup> Some weeks later, however, when the same question was put before the Convention, Pennsylvania and Virginia voted no; the other nine States voted aye. This vote was final,<sup>11</sup> and the result of all this consideration was presently embodied in the Constitution in the following words:

“The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof.” Art. I., Sec. 3, Par. 1.

“The Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by law make or alter such Regulations, except as to the Places of chusing Senators.” Art. I., Sec. 4, Par. 1.

But the Constitution could be of no effect until it had run the gauntlet of the state ratifying conventions; and, in these assemblies, opposition of the most radical and persistent character was directed against some features of the proposed frame of government. It is significant, however, that in most of these conventions, as their deliberations are reported in *Elliot's Debates*, not a word of criticism was directed at the election of senators by the legislatures. In the South Carolina convention, it is true, Mr. Lowndes referred to it as “exceedingly objectionable,” and declared that in that State the practice of choosing senators by the lower house had proved so inconvenient and oppressive that in framing the present constitution, great care had been taken to vest the power of electing senators originally

<sup>10</sup> June 7.

<sup>11</sup> June 25.

with the people, as the best plan for securing their rights and privileges. In the New York convention, the only question in controversy was whether the state legislatures, by virtue of their right to elect, should also have the right to recall senators. Hamilton vigorously opposed the recognition of any such right, insisting that the main design of the Convention in forming the Senate had been to prevent fluctuations and cabals, and that it was absolutely necessary that the Senate should be so formed as to be unbiased by false conceptions of the real interests, or undue attachment to the apparent good of their several States.

Nor was it alone in the conventions, to which its fate was committed, that the Constitution was sharply assailed. No sooner had its provisions been made public than they became the target of the keenest criticism from the platform, the newspaper and the pamphleteer. Yet in all this mass of contemporary criticism hardly any comment is passed upon the mode of electing senators. The writers of *The Federalist* set themselves the mighty task of expounding the principles of the Constitution and of defending the provisions which seemed least popular or most open to attack. But they felt no need of devoting their energies either to expounding or to defending the sections relating to the election of senators. That subject is referred to but twice. In one of these passages, emphasis is laid upon the grounds for expecting that the Senate would generally be composed with peculiar care and judgment, by virtue of its being chosen by such select bodies as were the state legislatures.<sup>12</sup> In another number, either Hamilton or

<sup>12</sup> *The Federalist*, No. XXVII.

Madison writes: "It is equally unnecessary to dilate upon the appointment of senators by the state legislatures. Among the various modes which might have been devised for constituting this branch of the government, that which has been proposed is probably the most congenial with public opinion. It is recommended by the double advantage of forming a select appointment, and of giving to the state governments such an agency in the foundation of the federal government as must secure the authority of the former, and may form a convenient link between the two systems."<sup>18</sup>

This may be, as Justice Story characterized it, a very subdued praise, yet in those few words, "probably the most congenial with public opinion," is set forth a fact of the first importance, too much neglected in later discussions—a fact so near at hand and familiar to the members of the Convention that it found no mention in their debates. In recent years some advocates of the election of senators by the people have been wont to condemn in severest terms the distrust of the people shown by the framers of the Constitution, and to refer to the members of the Convention as a group of aristocrats and reactionaries. History affords scant warrant for such charges. In different centuries democracy seeks for itself different agencies or forms of expression. To most of the soundest thinkers of the last quarter of the eighteenth century, for the filling of important offices no agency seemed more normal, no agency was more prevalent, than an election by state legislatures. From current practice, almost as a matter of course, the framers of the Constitution gave this

<sup>18</sup> *The Federalist*, No. LXII.

method their approval. It had been by their legislatures that the thirteen Colonies made protest against British oppression, and later prepared for common resistance. Throughout the war it had been the state legislatures which elected the governors and most of the other officers, both civil and military. It was by these same legislatures that the members of the Continental Congress were commissioned. Under the Articles of Confederation, although it was the law that delegates to Congress should be annually appointed in such manner as the legislatures of the states might direct, it was by the legislatures themselves that the delegates still continued to be elected. It was thus, for example, that Thomas Jefferson had been elected to Congress in 1783. Under the state constitutions which had been framed before the meeting of the Convention of 1787, the governor was elected by the direct vote of the freemen only in New York and in the New England States; in New Jersey, Maryland, Delaware, Virginia, North Carolina and South Carolina he was elected by the joint ballot of the legislature; in Pennsylvania, by joint ballot of the assembly and of the executive council; and in Georgia the election was by the single house of assembly.<sup>14</sup> In the great majority of states the judges

<sup>14</sup> Charles R. Lingley, *The Executive Department under the First American Constitutions*, pp. 13-14. Such legislative elections continued for many years. In 1897, Senator Turpie of Indiana declared in the Senate: "Even in my own lifetime I recollect being canvassed as a member of the legislature, as the legislature elected circuit judges and the governor, and the State Senate appointed the supreme judges." The election of judges by the legislature still continues in Rhode Island, with results which do little to commend the method.

were elected by the legislatures. Finally, the members of this very Convention had themselves all been elected in this same way by the legislatures of their several States; their credentials, much like those of a senator of the present day, are to be found in the regular legislative journals. It would have been self-stultification, indeed, had the members of this, the most eminent constitutional convention known to history, assented to the proposition that the choice of a Senate by state legislatures could not give a worthy representation of the people. In the words of Senator Turpie: "The state legislatures during the War for Independence and for some time afterward were the favored and trusted depositories of a variety of delegated powers. It is not strange, therefore, that the part given them in the election of members of the Senate should have attracted little notice, elicited no dissent."

## CHAPTER II

### THE REGULATION OF SENATORIAL ELECTIONS

UPON the state legislatures, the Constitution conferred not only the power of electing senators, but also the power of determining the places, and, subject to possible regulation by Congress, the times and the manner of making the choice. In the Virginia convention, in response to the question why the Constitution did not give Congress the power to regulate the place of electing senators as well as of representatives, Madison replied that in that case Congress might compel the state legislature to elect them in a different place from that of their ordinary sessions, which would produce much inconvenience and was not necessary to the object of regulating the elections; but that it was necessary to give the general government a control over the time and manner of choosing the Senate, to prevent its own dissolution.

For more than seventy-five years, Congress was content to possess this power without assuming its exercise. Meantime, the States regulated the matter to suit themselves. In the early years the choice of senators was generally, though not universally, made by concurrent vote of the two houses of the legislature in separate session. At a later period, about one-half of the States came to require the election to be made by

a vote in joint convention; but the weight of constitutional authority seems to have been against this practice, on the ground that when the Constitution prescribed an election by the legislature, the intent was that that body should perform that function legislatively, as in the passing of any ordinary act, i.e., by concurrent vote.<sup>1</sup> One of the chief considerations which commended the election of senators by legislatures to Gerry and others of like mind was their belief that in this form of election the aristocratic upper house would hold in restraint the "turbulency of democracy" in the lower branch—a confidence which they would have recognized as groundless, if it had been expected that the elections would be made in joint session. It might further have been contended that, as this election was a legislative act, it was subject to the veto of the governor; but universal practice has been against recognizing any such executive participation in the choice of senators.

Yet, insistence upon a concurrent vote led not infrequently to deadlocks, resulting in a failure to make any election, when the two houses were under the control of different parties. Senator Fessenden's experience was typical, and significant of the need of federal regulation upon this point. Eighteen times, he declared, did the Maine Senate, during a single session of the legislature, elect him to the United States Senate; but the lower house refused to concur, and hence the seat remained vacant throughout that Congress. As time went on, such embarrassments became more frequent. Thus, in the Twenty-seventh Congress, Tennessee had

<sup>1</sup> This is the view of Justice Story, *Commentaries on the Constitution*, Secs. 705-708.

but one senator, because the two houses of her legislature refused to go into joint convention to elect. California found exceptional difficulty in electing senators. Three times within a period of five years her legislature failed to make an election, 1851, 1855, 1856. A contest in Indiana, a few years later, deserves to be narrated in some detail, as affording the clearest of proof that the absence of uniform regulation of senatorial elections served as a constant temptation to sharp practice for partisan advantage on the part of members of the legislature. In the Thirty-fifth Congress, until within three weeks of the end of its last session, Indiana was represented by but one senator. The Congress was to expire on the 3d of March, 1857. On the 4th of February, a minority of the Indiana Senate, which had long been in deadlock with the House over the election, went to the hall of representatives and, there meeting with a majority, but not a legal quorum, of the members of the House, proceeded to ballot for a senator to fill the existing vacancy, and for another to succeed the senator whose term was about to expire. The men, who were declared to be elected as a result of this balloting, forthwith presented themselves in Washington, and their credentials were accepted by the Senate. Formal protest, however, was made by a majority of the Indiana Senate and by a large number of the members of the House. It was contended that the joint convention, if such it could be called, which had elected these men, had not been legally summoned, and that it was not competent to elect senators, inasmuch as no Indiana law authorized a joint session of the legislature for any other purpose than the election of governor, in case of

a tie vote. As the United States Senate did not reverse its decision, at the next session the Indiana legislature, which had meantime become Republican in both branches, treated the seats as vacant, and proceeded by concurrent vote to elect two men to fill the alleged vacancies. The committee to which the case of these new contestants was referred reported in favor of their exclusion, and laid down the rule that the legislature of a State possessed no authority to revise the decision of the Senate under its unquestioned and undoubted constitutional authority to judge of the qualifications of its own members. While this case was still pending, Simon Cameron's election was contested, on the ground that there had not been a concurrent majority of each house in his favor; but the Senate committee reported that this ground of protest was untenable under the statute of Pennsylvania, and "the uniform practical construction of the Federal Constitution for the last half-century."

With a view to avoiding such annoying contests by removing their cause, less than three weeks after the questionable Indiana election, above described, a bill was brought into the Senate "to prescribe the time and manner of electing senators in Congress, and the form of their credentials." This was referred to the committee on the judiciary, and was heard from no more. To the same committee, the following year, was referred a similar bill, which was duly reported back with an amendment in the nature of a substitute; but to this the Senate gave no consideration. For the next five years Congress was too much occupied with weightier matters to attend to this proposed change; but no

sooner was the war at an end than troublesome questions in regard to senatorial elections were again thrust upon its notice. Thus, in 1866, the election of Mr. Stockton of New Jersey was challenged on the ground that the joint assembly which elected him had exceeded its powers in declaring that the candidate receiving a plurality of votes should be elected. By a vote of 22 to 21—Mr. Stockton himself voting—the Senate sustained its committee's report that, for the purpose of electing senators, the joint assembly was the legislature, and hence entitled to lay down the plurality rule. Three days later, however, this action was reconsidered: the Senate decided that the contestant's vote should not be received in determining the question as to his own seat, and upon the next vote he was unseated. This typical case, suggestive of the host of perplexing questions sure to arise so long as no uniform regulation of the manner of senatorial elections was provided, and sure to be decided by the Senate only with many heart-burnings and many anxious forecasts of party advantage—seems to have exhausted the patience of Congress. Forthwith, the Senate instructed its committee on the judiciary to inquire into the expediency of providing a uniform and effective mode of securing the election of senators by the legislatures; and, on the 9th of July, 1866, there was reported from the committee a bill to regulate the times and manner for holding senatorial elections.<sup>2</sup>

In brief, the bill provided that on the first Tuesday

<sup>2</sup> Mr. Blaine declared that the direct fruit of the Stockton controversy was the law of 1886, whereby Congress regulated the election of senators. To this he attached great significance: "The exercise of this power was the natural result of the situation

after the meeting and organization of a legislature, when a senator is to be elected, the two houses shall meet separately, and by a *viva voce* vote name a person for senator. On the following day, the two houses shall meet in joint assembly and the results of the voting shall be canvassed. If each house has given a majority vote to the same man, he is elected; if not, "the joint assembly shall meet at twelve o'clock, meridian, of each succeeding day during the session of the legislature, and take at least one vote until a senator shall be elected." The advocates of this measure laid much stress upon the fact that public interest requires that each State be fully represented in the Senate, and hence a law should be framed which would have regard to the habits and predilections of the several States so far as possible, but would, at the same time, insure a complete representation from the States through some uniform system of election.

Senator Sherman declared that he saw in past experience little to prove the need of the exercise by Congress of its unquestioned right to regulate senatorial elections. The only outspoken opposition to the principle of the measure, however, came from Senator Saulsbury of Delaware, who denounced it as a deplorable interfer-

in which the nation was placed by the war. Previous to the Civil War every power was withheld from the national government which could by any possibility be exercised by the state government. Another theory and another practice were now to prevail; for it had been demonstrated to the thoughtful statesmen who then controlled the government that everything which may be done by either nation or state may be better and more securely done by the nation. The change was important, and led to far-reaching consequences."—James G. Blaine, *Twenty Years of Congress*, Vol. 2, p. 160.

ence by the federal government in state affairs where no inconvenience in the past had called for any such regulation. Recent Delaware history lends peculiar interest to the further remarks of this Delaware senator. "It may be true," said he, "that sometimes legislatures have failed to elect, but very seldom, and I do not know that there has been any great inconvenience. If they had failed to elect a little oftener, perhaps it would have been for the public good, but certainly the legislation of the country has not suffered owing to this fact."<sup>8</sup>

Upon three matters of detail there were sharp differences of opinion. One of these was whether the voting for senators should be *viva voce* or by secret ballot. The bill provided that the members of the legislature should give their votes *viva voce*, but some of the most influential senators opposed the open vote. As Senator Fessenden said, the *viva voce* vote was liable to put men under restraints from party discipline which would lead them to act against their conscientious convictions. Further objection was made that this was an unnecessary insistence upon uniformity; that it would be offensive to the States which had given up the open vote; and that the ballot was the more free and unembarrassed mode of voting. Senator Saulsbury asked: "Is it possible that we can persuade ourselves that the people who send a representative to the state legislature do not know for what particular man that representative votes, whether the vote be by ballot or *viva voce*?" Yet, having thus argued that the ballot should not be precluded

<sup>8</sup> In regard to later Delaware vacancies in the Senate, *infra*, p. 60, 62, 63, 195.

since the legislator's vote would be known anyway, almost in the same breath he opposed the open vote as exposing the legislator to the view of those to whom he might be under—it may be—pecuniary obligations, who would thus hold the rod over him—a suggestion surprisingly prophetic of Delaware senatorial elections of the present day. On the other hand, it was argued that the *viva voce* vote was largely in use, particularly in the Western States. Several senators, like Daniel Clark and Charles Sumner, who advocated the use of the secret ballot in all ordinary elections, laid emphasis upon the fact that the legislator, in voting for senator, acts in a representative capacity; his constituents may even have given him specific instructions, and it is, therefore, their right to know for whom he votes. These considerations prevailed, and the open vote was retained.<sup>4</sup>

Should the election be by concurrent or by joint vote? The Constitution, as has been observed, prescribed only that the election of the senators should be by the legislatures. It was the contention of Chancellor Kent that the true interpretation of his phrase called for a vote by the two houses, acting in their separate and organized capacities, with the ordinary constitutional right of negative on each other's proceedings.<sup>5</sup> But with the

<sup>4</sup> Wisconsin has not only followed the example of the federal law, but has gone a step further. By a law of 1899 it is required that in any legislative caucus for the nomination of a candidate for United States senator, each member shall vote *viva voce* upon a call of the roll, and such votes shall be entered upon the minutes of the caucus.

<sup>5</sup> Kent's *Commentaries*, Pt. 2, Lec. XI., pp. 225-6. He cites the *Federal Farmer*, Letter XII., as affording a contemporary exposition upholding this view.

framers of this law of 1866 practical considerations had great weight, and, despite the high authority upon which it rested, led to the rejection of this interpretation of the Constitution. In order to lessen the chances of a failure to elect, as in the Indiana experience of 1857, it was felt that some provision must be made for a joint vote; yet, out of deference to the predilections for a concurrent vote—as a concession, it is said, to the practice in New York and in New England—the law was made to provide that the first vote should be taken by the two houses separately, with a resort to a joint convention, in case the concurrent vote failed to elect. Several senators, particularly Senator Sherman, protested against this preliminary separate vote. They asserted that since all later voting was to be done by joint assembly, nothing was to be gained by following a different method in the first vote; on the other hand, by disclosing the preference of each member and the difference between the two houses, it would show at the very outset how easy it might be for a small minority to prevent, if it could not control, the election. In spite of these protests, this feature of the bill remained unchanged; but experience has proved that the objections were well grounded.

To what extent should the senatorial election be allowed to delay legislation? As originally reported, the bill provided: "the joint assembly shall continue to vote for senator, without interruption by other business, until a senator is elected." Against this Senator Sherman and others made vigorous protest. They insisted that, with this power to block all state legislation at its command, a small factional minority would

hold out until it forced the majority to yield to its demands. On the other hand, Senator Clark, who reported the bill from the committee, declared: "I do not believe it would occur once in a hundred years that any third party would stand out in the way the Senator from Ohio suggests, and thus prevent the ordinary legislation of the State." Experience certainly has left no doubt as to whether the Senator from New Hampshire or the Senator from Ohio had the clearer comprehension of political tendencies. Yet other senators did not hesitate to go still further. Senator Johnson declared that it was infinitely a higher duty upon the part of the States and the members of the legislatures of the several States to elect senators of the United States—the government of the United States being important to all the States—than it was to go on with ordinary legislation. Hence, he believed heartily in stopping the wheels of state legislation till that duty was performed, and he felt that depriving the State of power to make its own laws was not a disproportionate penalty. But more practical counsels prevailed, and this clause was amended so that, instead of putting an absolute stop to all state legislative business until an election should be secured, it provided for at least one vote daily by the legislature in joint session until a senator should be elected. The bill was further criticised because it did not allow election by plurality, and because, by virtue of the different terms of the legislatures, in some States they would be compelled to elect a senator at least fifteen or eighteen months before a vacancy was to occur, a procedure which at times might yield very unsatis-

factory results.<sup>6</sup> These provisions, however, remained unchanged.

In the Senate, the discussion of this important measure occupied but a single day. Senator Saulsbury's opposition was unremitting, up to the very end. As the bill was about to be put to vote upon its final passage, the Senator from Delaware took the floor and said: "I have heard an eminent physician say that the best thing to do with cucumbers was to dress them well with vinegar, pepper, salt and mustard, and then throw them to the hogs. I think the best thing to do with this bill is to indefinitely postpone it, and I therefore move that it be indefinitely postponed." But the motion was not agreed to; and the bill was forthwith passed by a vote of 25 to 11. In the House it was passed under the operation of the previous question without a word of debate, although some attempt was made by representatives from Iowa and Kentucky to block it by motions to lay it upon the table, and to adjourn. The bill became a law July 25, 1866, more than half a century after Congress had entertained the first proposition for the regulation of the election of senators.<sup>7</sup>

Much that was expected from this law it has failed to accomplish. It cannot be said that it has had any considerable effect in discouraging deadlocks, or in preventing vacancies in the Senate. Indeed, whether because of the law or in spite of the law, both of these

<sup>6</sup> *Infra*, p. 128.

<sup>7</sup> The first bill with this object was introduced in 1814. The law of 1866 is to be found on p. 34. For the proceedings and debate in connection with this bill, see *Journal of the Senate*, July 11, and *House Journal*, July 23, 1866; and *Congressional Globe*, Thirty-ninth Congress, First Session.

evils have been on the increase since its passage.<sup>8</sup> Nor in the mere matter of prescribing a uniform elective procedure has it proved entirely satisfactory. In 1883, the passage of an amendment was urged which should provide a form of certificate giving in great particularity the record of the election in the legislature. The man who introduced this measure declared that there had been great laxness in this matter, and that of the senators chosen at the last preceding election, one-half did not have certificates which would stand the test under the existing law, if objection were made. But the bill was reported adversely, the committee declaring that under existing law a recital by the governor of the State that the person named for senator was legally elected was all that was required. A few years later, a committee was instructed to consider the expediency of prescribing a form of credential for the guidance of the executives of the several States, but no report was made. In 1888, a memorial from the Iowa legislature was presented urging Congress to remove an ambiguity in the law by making it provide more specifically that the first vote for senator be taken on the second Tuesday after the "permanent" organization of the legislature. This memorial was referred to the committee on the judiciary, to which divers other proposals of change have been referred, and from which they have never emerged. The law still retains its original form, in spite of the fact that in recent years more than one writer has strongly advocated giving back to the States the power to regulate elections, thus taken from them. Particular condemnation has been

<sup>8</sup> *Infra*, pp. 36-38, 69, 70.

visited upon its "pernicious enforcement of *viva voce* voting, most favorable to party pressure and bribery;" and it has been insisted that the objections urged by the senators in 1866 have been abundantly sustained by experience.<sup>9</sup>

Inasmuch as Congress has now exercised its power of regulating senatorial elections, it remains to ask whether the States may still in any respect limit or restrict the election. Doubtless in every one of the older States, upon this point there has grown up a custom of the Constitution, even if it has not found embodiment in positive law. There are understandings which are always observed, precedents which are always followed. For example, there is a feeling in most States that the two senators ought to be residents of different sections of the State, in order that they may represent it most effectively. Occasionally this is disregarded—indeed, in recent Congresses the senators from Indiana have been both residents of the same city; but this is a rare exception. In Vermont, unvarying precedent requires that one senator shall have resided on the east side of the Green Mountains and the other on the west side. In all her history as a State it is said that this custom has never once been violated. Maryland did not trust her restraints to custom, but, for many years, attempted to bind her legislatures in the choice of senator by the provisions of statute law. As early as 1809 it was enacted: "One of the senators shall always be an inhabitant of the eastern shore and the other of the western shore." The results of such restrictions can hardly fail to be both absurd and injurious. They limit the

<sup>9</sup> W. P. Garrison, in *The Nation*, Vol. 54, p. 44 (Jan. 21, 1892).

range of choice, and often deprive the State of the service of some of its most distinguished men; they block political careers of great promise, and deter many useful men from entering political life. In electing members of the House, the loss to the country from servile adherence to the custom that representatives must come from single-member districts, and each be a member of his district, has been incalculable; and any rigid conformity to a like custom in regard to the election of senators is greatly to be deplored. The workings of the Maryland law are instructive. The eastern shore had less than one-sixth of the population of the State; yet in the existing stage of American political development, if it could be assured of one of the two senators, it might count with confidence upon a very large share of federal patronage. Hence, the eastern shore's pertinacious resistance to every effort for the repeal of the law—a thing desired, it was said, by both parties, since both had felt its embarrassments. When, in 1867, the dominant party wished to elect to the Senate one of the State's most eminent citizens, who had the misfortune to live on the wrong side of the Chesapeake Bay, this ancient statute was bodily repealed; but, as soon as that exigency was passed, it was promptly reenacted. Subsequently, in the election of a senator, the legislature set the law frankly at defiance. To retain upon the statute book a law which is to be obeyed, violated or repealed, as may chance in any given year to serve the interests of the party then in power, both marks and encourages a low standard of political morality. Yet, not until 1896 did this restriction finally disappear.

To such geographical restrictions as these it might

be objected not only that they are inexpedient, but that they are unconstitutional, since they are of the nature of a qualification for membership in the Senate, whereas, in repeated instances, the doctrine has been affirmed that "no State by statute or otherwise may add qualifications for a senator not prescribed in the Constitution."<sup>10</sup>

For nearly two score years the law of 1866 has regulated the election of senators. Under it, every other year, thirty senators are chosen; yet the precise procedure seems to be but little understood. Thus, so reliable and well-informed a journal as the Springfield *Republican* described what took place in the Rhode Island Assembly, January 17, 1905, as follows: "Nelson W. Aldrich was nominated by both houses of the State General Assembly for a fifth term at Providence by the Republicans, and National Committeeman George W. Greene by the Democrats. The nominating vote was . . ." What really took place was not the nomination of Aldrich, but his election. On the other hand, that same day the papers the country over proclaimed that in Missouri, Thomas K. Niedringhaus was elected, he having received a majority of the total number of votes cast in both houses of the legislature. But what the law requires on this first vote is "a majority of all the votes in each house." If that is secured the election is made, and nothing remains for the joint assembly upon the following day but the formal veri-

<sup>10</sup> Case of Judge Trumbull of Illinois, 1855; case of Faulkner of West Virginia, 1888. See Taft, *Contested Senate Election Cases* (1903). For data in regard to elections in Vermont and Maryland, see J. H. Flagg, "The Choice of United States Senators," in *New England Magazine*, Vol. 14, pp. 190-194.

fication of the record of each house, and the announcement of the result. If, however, no candidate secures such a majority of votes in each house, the task of electing the senator passes forever from the hands of the separate houses as such, and devolves upon the joint assembly. Thus, although in the separate vote Niedringhaus secured a clear majority of eight votes above all other candidates, it availed him nothing, for his supporters had not mustered a majority in the Senate; and, after the election was thrown into the joint assembly, in the sixty days of the deadlock he could not secure a majority.

THE LAW REGULATING THE ELECTION OF SENATORS.  
(1866.)<sup>11</sup>

*An Act to regulate the Times and Manner of holding Elections for Senators in Congress.*

*Be it enacted . . . ,* That the legislature of each State which shall be chosen next preceding the expiration of the time for which any senator was elected to represent said State in Congress, shall, on the second Tuesday after the meeting and organization thereof, proceed to elect a senator in Congress, in the place of such senator so going out of office, in the following manner: Each house shall openly, by a *viva voce* (vote) of each member present, name one person for senator in Congress from said State, and the name of the person so voted for, who shall have a majority of the whole number of votes cast in each house shall be entered on the journal of each house by the clerk or secretary thereof; but if either house shall fail to give such majority to any person on said day, that fact shall be entered on the journal. At 12 o'clock, meridian, of the day following that on which proceedings are required to take place, as aforesaid, the members of the two

<sup>11</sup> *United States Statutes at Large*, Vol. 14, pp. 243-444.

houses shall convene in joint assembly and the journal of each house shall then be read, and if the same person shall have received a majority of all the votes in each house, such person shall be declared duly elected senator to represent said State in the Congress of the United States; but if the same person shall not have received a majority of the votes in each house, or if either house shall have failed to take proceedings as required by this act, the joint assembly shall then proceed to choose, by a *viva voce* vote of each member present, a person for the purpose aforesaid, and the person having a majority of all the votes of the said joint assembly, a majority of all the members elected to both houses being present and voting, shall be declared duly elected; and in case no person shall receive such a majority on the first day, the joint assembly shall meet at twelve o'clock, meridian, of each succeeding day during the session of the legislature, and take at least one vote until a senator shall be elected.

Sec. 2. *And be it further enacted*, That whenever, on the meeting of the legislature of any State, a vacancy shall exist in the representation of such State in the Senate of the United States, said legislature shall proceed, on the second Tuesday after the commencement and organization of its session, to elect a person to fill such vacancy, in the manner hereinbefore provided for the election of a senator for a full term; and if a vacancy should happen during the session of the legislature, then on the second Tuesday after the legislature shall have been organized and shall have notice of such vacancy.

Sec. 3. *And be it further enacted*, That it shall be the duty of the governor of the State from which any senator shall have been chosen as aforesaid to certify his election, under the seal of the State, to the president of the Senate of the United States, which certificate shall be countersigned by the secretary of state of the State.

APPROVED, July 25, 1866.

## CHAPTER III

### SOME RESULTS OF THE SYSTEM OF ELECTION

AFTER long deliberation, the Federal Convention determined that, in the Senate, there should be equality of representation, and that senators should be elected by the legislatures of the several States. Eighty years later, by the law of 1866, Congress prescribed the mode of the election. An elaborate piece of political machinery has thus been designed, improved and set in operation. How has it worked?

#### A. DEADLOCKS IN SENATORIAL ELECTIONS.

In the first place, what is to be said of its reliability? In the debates of the Convention there is no hint of any suspicion that elections of senators would ever fail to be made promptly. Apparently, the extensive experience with elections by legislatures, which led to its ready adoption for the choice of senators, had been free from bitter and prolonged contests. Political parties were as yet in their infancy: their fierce and all-engrossing conflicts none could foresee. Even eighty years later, when the form of regulation to be prescribed by Congress was under discussion, Senator Clark, who reported the present measure from committee, seemed to think that the deadlocks of recent years had been due

merely to the fact that the two houses of a state legislature were not compelled by federal law to meet in joint assembly and thus end their controversies. Accordingly, the present law was enacted. With what result? The extent of this law's failure to remove the evil at which it was chiefly directed, may be seen from the record of deadlocks in the elections of the past fifteen years:<sup>1</sup>

<sup>1</sup> The term "deadlock" implies a prolonged and stubborn contest. If it be objected that some of these contests were not long enough to deserve a place in the list, the reply is that no contest has been listed here which was not so bitter and unyielding that its only issue could be, either the preventing of any election, or the choice of a senator who would win his high office not because of any preëminent qualifications, but because he chanced to be found possessed of such qualities that the hostile and disappointed factions in the joint assembly could be reorganized under his banner and led to victory. For it goes without saying, that the man, for whom in the last ten minutes of a legislature's term, it is easiest to stampede the angry mob of members, worn out by weeks—it may be, months—of fighting, is not by that fact proved to be the ideal choice for a senator of the United States. The length of the deadlocks has here been reckoned in calendar days from the date on which the two houses balloted separately till the date of the final vote of the contest. In this way, alone, could uniformity in presentation be secured; for it is obviously impossible to ascertain upon precisely how many days between those two limits, the individual legislatures were actually in session. But, on each of those days, in accordance with the law of 1866, at least one vote for senator had to be taken.

The data for the table were obtained from Appleton's *Annual Cyclopædia*, and from the New York *Tribune Almanac*. In cases of conflict or of doubt, reference was made to the files of journals of the several state legislatures in the Massachusetts State Library, and to newspapers of the given State. Many points have been determined by correspondence with the secretaries of the several States in question.

## RECORD OF DEADLOCKS.

Date.	State	No. of Days.	Ballots.	Senator Elected.
1891.	Florida.	35	*c. 75	Wilkinson Call.
	North Dakota.	3	17	H. C. Hansbrough
	South Dakota.	27	40	J. H. Kyle.
1892.	Louisiana.	44		No election.
1893.	Montana.	50	44	No election.
	Nebraska.	21	17	W. V. Allen.
	North Dakota.	33	61	W. N. Roach.
	Washington.	51	101	No election.
	Wyoming.			No election.
1895.	Delaware.	114	217	No election.
	Idaho.	51	52	G. L. Shoup.
	Oregon.	32	58	G. W. McBride.
	Washington.	9	28	J. L. Wilson.
1896.	Kentucky.	58	52	No election.
	Louisiana.	9	6	S. D. McEnergy.
	Maryland.	8	7	G. L. Wellington.
1897.	Florida.	24	*c. 45	S. R. Mallory.
	Idaho.	15		Henry Heitfelt.
	Kentucky.	36	60	W. J. Deboe.
	Oregon.	53	†—	No election.
	South Dakota.	29	27	J. H. Kyle.
	Utah.	17	53	J. L. Rawlins.
	Washington.	7	25	George Turner.
1898.	Maryland.	7	10	L. E. McComas.
	Tennessee.	7	7	T. B. Turley.
1899.	California.	67	104	No election.
	Delaware.	64	113	No election.
	Montana.	17	17	W. A. Clark.
	Nebraska.	50	43	M. L. Hayward.

\* Number estimated by Secretary of State.

† No ballot was possible (*infra*, pp. 68, n. 10; 193).

Date.	State.	No. of Days.	Ballots.	Senator Elected.
1899.	Pennsylvania.	92	79	No election.
	Utah.	52	164	No election.
	Wisconsin.	8	6	J. V. Quarles.
1901.	Delaware.	52	46	No election.
	Delaware.	52	46	No election.
	Montana.	51	66	Paris Gibson.
	Nebraska.	72	54	C. H. Dietrich.
	Nebraska.	72	54	J. H. Millard.
	Oregon.	22	53	J. H. Mitchell.
	Delaware.	41	36	J. F. Allee.
1903.	Delaware.	41	36	L. H. Ball.
	North Carolina.	10	9	L. S. Overman.
	Oregon.	32	42	C. W. Fulton.
	Washington.	9	13	Levi Ankeny.
	Maryland.	16	12	Isidor Rayner.
1905.	Delaware.	80	51	No election.
	Missouri.	60	67	William Warner.

But statistics such as these can give nothing more than a hint of the stubbornness and acrimony of these contests; while many of the most important features they fail entirely to reveal. Thus, a table such as this can take no account of the extent to which the party caucus often dominates the whole situation. In most States, the legislative caucus is entirely unknown to the law; it meets behind closed doors; its proceedings are not a matter of record. Reports may leak into the newspapers, but they are not authoritative, and soon pass out of mind. If the real facts of the caucus proceedings could be gotten at, some interesting and highly significant sections would be added to the history of legislative deadlocks. In the first place, it would be shown that many an election which, in later years, the mere reader of legislative journals would record as decided upon the first ballot by a majority so over-

whelming as to indicate great unanimity in the choice, was, as a matter of fact, preceded by an ante-election campaign so long and so fiercely fought as to present the successful candidate not at all in the light of the deliberate and imperative choice of a majority of the members of the legislature, still less of the people, but, rather, as the man whom the chance of the moment had brought into prominence, or, it may be, as the adroit manipulator of men, whose victory was won by tactics which find no recognition in the rules of civilized political warfare. The real campaign began weeks or even months before the legislature was convened. Moreover, the law of 1866, by requiring that the first vote shall be taken on the second Tuesday after the meeting and organization of the legislature, provides that a period of from six to thirteen days must elapse before the first step in the formal election can take place. During this time, the members are convened at the capital and are open to persuasion of one sort and another, from the managers of the rival aspirants. Thus, to choose from many instances, in Alabama in 1891, Senator Pugh was elected on the second ballot, but his nomination had been secured only after thirty-one votes had been taken in caucus. So, too, in the Ohio election of 1898, Senator Hanna was chosen on the very first joint ballot, but the approaching senatorial contest had dominated all other issues in the election of the legislature, while, in the intervening time after the legislature came together, and before the voting could begin, excitement reached the highest point, and persistent charges of bribery were made and investigated with irreconcilable testimony as the result.

Such contests as these can find no mention in a table of legislative deadlocks, for the reason that the prompt election by the legislature gives no hint of the struggle that has gone before. But there have been many other contests where it is no less true that, furious and long-continued as was the conflict in the joint assembly of the legislature, it was but stage-play until the real fight in the caucus behind the scenes had settled all the lines of the campaign, sorted out the champions, and virtually decided who the victor should be. In Kentucky, in 1890, the votes of the Democratic members were by prior and explicit arrangement "scattered" until a nomination by caucus solidified them. That in Florida, in 1891, the election was not effected till thirty-five days after the legislature began to ballot, is not hard to understand when it is known that at an early session of the Democratic caucus a resolution had been unanimously adopted that a committee should be appointed so to divide the vote as to prevent an election till the joint caucus should make a nomination. After the eighty-sixth fruitless ballot, the caucus at last renounced its task as hopeless. The very next day, freed from this restraint, the legislature elected Senator Call. Indeed, the legislative caucus, like the national House of Representatives, often finds itself hopelessly bound by its own rules. For example, the double deadlock in Nebraska in 1901 was mainly due to the rule, made by the Republican caucus, that seventy-six out of the eighty-four votes in the caucus should be necessary for a nomination—a rule so tight-drawn that the chief officers of the national Republican committee urged its relaxation, so as to make

possible a binding nomination by a majority or by a two-thirds vote of the caucus. In Florida, in 1897, on none of the twenty-four ballots in the joint assembly between April 20 and May 14, had Mr. Mallory received more than a single vote, but at a caucus, at two o'clock of the morning of the latter day, the leader of one of the factions was induced to withdraw, and Mallory was made the unanimous choice of those present. When the joint assembly was convened a few hours later, he was straightway elected, "the announcement of the result," so runs the report, "being followed by the wildest disorder." The next year, the caucus of Democratic members of the Tennessee legislature had already balloted eighty-six times for a candidate for senator, before the formal voting began in the joint assembly. It was not until the 145th ballot in the caucus that Mr. Turley was nominated; yet, the official record of the legislature merely shows that he was elected on the seventh ballot, and gives no hint of the bitter conflict which had made his triumph possible. In North Carolina, 1903, the election was effected upon the ninth ballot, but not until caucus action had focused the vote; for upon the first ballot in the legislature the Democrats scattered their votes among eighty-five candidates, and, after the deadlock had continued for a week, seventy-eight candidates were still voted for in a single ballot. Meantime, the caucus had not been idle, and the night following the vote last mentioned, upon the sixty-first ballot in caucus, Overman was nominated. The next day the president of the Senate declared in the joint assembly that nominations for United States senator were in order; whereupon, the single

nomination of Mr. Overman was made, and the nominee was forthwith elected by a vote of 138 to 21 cast for a single opponent, a performance which in fact, though not in law, amounted to nothing else than a ceremonious announcement of a victory already won behind the scenes. But the extent to which what purports to be a senatorial election may be reduced to stage-play is best of all illustrated by a Louisiana experience. Inasmuch as the term of the legislature of that State is four years, it devolved upon men elected in April, 1892, to choose a senator for a seat which was not to become vacant for nearly three years (March 3, 1895). The balloting in the joint assembly had already been going on for more than a month when, on the 27th of June, a Democratic caucus decided to postpone the election of the senator until the next year, but to ballot daily—as, indeed, the law of 1866 specifically required them to do—until the end of the session. For the remainder of the session, therefore, the fight was as that of one that beateth the air. In the aimless ballots from twenty-nine to forty-six candidates were voted for, but, of course, there was no election. In the final ballot, not less than thirty candidates received the doubtful compliment of a vote, one member signifying his appreciation of how significant this performance was by giving his vote for Grover Cleveland! It would be easy to extend almost indefinitely the list of illustrations of the fact that, under the law of 1866, it is possible for an entirely extra-legal organization not only to put obstructions in the way of the election, but to reduce the voting to a mere farce, and to postpone the election from year to year.

If no candidate receives a majority in each house, at the first vote, the law requires that at least one vote be taken on each succeeding day of the session until a senator is elected. But the statement that, in a deadlock lasting through thirty-two days, there were fifty-eight ballots taken, as in Oregon in 1893, might give the impression of leisurely voting and of final choice reached with careful weighing of the merits of the possible candidates. For a correct understanding of the situation, it must be added that the candidate who was successful by a majority of *one* in the fifty-eighth and final ballot had not even been nominated until just fifteen minutes before the time when the term of the legislature must expire. Nor is this stampeding of the assembly a matter of rare occurrence. Frequently, and in many States, the final vote has been taken but a few moments before the end of the session. To make no present mention of the instances where no election was effected, on two other occasions (1901 and 1903) an Oregon senator has been elected in the closing hour of the session. In Nebraska, in 1901, neither of the two vacancies had been filled until the last day of the session's life. In the same year the clock in the hall of the Montana Assembly still testified that it was not yet midnight; but it was 3.30 A.M. before the legislature—whose term, but for the legal fiction, had already expired—was stampeded into electing a man who, up to that moment, had hardly been given a serious thought as a candidate. In Delaware, in 1903, the double deadlock was not broken till the very end of the session. In the Missouri election of 1905, although one of the candidates received a majority of the total number of votes

cast in the two houses separately, and was thereupon all too promptly congratulated by the President of the United States, he failed to secure a majority upon the first vote in the joint assembly, and not until sixty days later, within ten minutes of the time set for the final adjournment of the general assembly, was it possible to unite upon a candidate who could command a majority—a man whose name was not proposed until the balloting had been going on for nearly fifty days, and who was not thought to have a serious chance until just before the final session.

And not only are the ballots many, but they are most unevenly distributed through the session. In Montana, in 1901, twenty-two of the sixty-six ballots were taken upon the last day of the session. In Oregon, the same year, of the fifty-three ballots of the entire session, twenty-five were taken upon its final day; even then the result was a tie, but enough changes were forthwith announced to secure the election of J. H. Mitchell. In the first year of the decade run of farce, which the Delaware legislature has played under the stage management of J. Edward Addicks, toward the end of the session the balloting waxed fast and furious: on a single day forty-two ballots were taken, and on the following day thirty-seven, the last of them but a few minutes before the final adjournment; yet all to no effect, and Delaware was left with but one senator in the next Congress.

Another significant feature of recent senatorial elections is the astonishing multiplication of candidates. The record may have been established by the North Carolina legislature's list of eighty-five candidates in

1903; but other States have made a notable showing. On the first ballot, in the Mississippi Assembly of 1896, thirty-four candidates received support. In the elections of 1899, twenty-one candidates were voted for in Montana, sixteen in Nebraska, seventeen in Pennsylvania, twenty in Utah, while in the mad hunt for some name by which the Delaware legislature might be stampeded, not less than twenty-seven candidates were brought forward. That any one of these States should have twenty, not to say eighty-five candidates of first or even of third-rate senatorial timber is sufficiently improbable. But the election of senators by the state legislatures has become so much a game of chance that often even the darkest of dark horses is kept in the running to the very end.

Another thing which statistics cannot reveal is the spirit, the temper of the election. In such prolonged contests, involving the most intense personal and party interests, it is hardly conceivable that the contestants should face the prospect of a drawn game with the calmness of opponents at chess. The stake is too heavy. As the inevitable hour of adjournment approaches, the tactics are changed. It may be that resort is had to parliamentary sharp practice. Thus, in the Pennsylvania election of 1890, when it was rumored that by breaking pairs the deadlock was to be broken in favor of Quay, the Democrats and independents countered by joining to prevent a quorum; and for twenty-eight days they made it impossible for the joint assembly to take a vote. In Wisconsin, in the same year, before the taking of the fifth ballot it was formally announced that it had been agreed upon that, at that meeting of

the joint assembly, but one vote should be cast for each of the candidates for United States senator, and that the members designated for this duty would cast such votes. Accordingly, upon the roll-call one vote was given for each of six candidates, while 127 members were recorded as "absent or not voting." In Maryland, January 30, 1904, upon the call of the roll, one senator and six members of the House answered to their names. "The chairman of the joint assembly then ordered the sergeant-at-arms to bring in the absentees—after a careful search he reported that he could not find any member of either house," whereupon the assembly was adjourned for lack of a quorum. In Delaware, in 1895, the acting governor, who from the day that he assumed the functions of the chief executive had taken no part in the proceedings of the Senate, in the last session was induced to assert his right both to preside and to vote, and thus blocked the election; two years later, in Delaware a "rump" house proceeded to organize and declare Addicks elected.

Or, the growing tenseness of the strain may evidence itself not in parliamentary strategy, but in riotous demonstrations more appropriate to a prize-fight than to a senatorial election. To cite the most recent instance, the Missouri election of a senator, in 1905, took place in the midst of a riot. Lest the hour of adjournment should come before an election was secured, an attempt was made to stop the clock upon the wall of the assembly chamber. Democrats tried to prevent its being tampered with; and when certain Republicans brought forward a ladder, it was seized and thrown out of the window. A fist-fight followed, in which many

were involved. Desks were torn from the floor and a fusillade of books began. The glass of the clock-front was broken, but the pendulum still persisted in swinging until, in the midst of a yelling mob, one member began throwing ink bottles at the clock, and finally succeeded in breaking the pendulum. On a motion to adjourn, arose the wildest disorder. The presiding officers of both houses mounted the speaker's desk, and, by shouting and waving their arms, tried to quiet the mob. Finally, they succeeded in securing some semblance of order. Instances might easily be multiplied of recent senatorial elections which have taken place in the midst of frenzied excitement.<sup>2</sup> It is ridiculous

<sup>2</sup>In the Florida legislature of 1897, on the 25th ballot the result was first announced as a tie. "Pandemonium prevailed for a time, the partisans of both candidates jumping upon desks and chairs and waving their arms frantically in efforts to make themselves heard." The election the same year in Utah is thus described by a local paper: "Upon the floor of the assembly members boldly charged that their colleagues were slaves of a priesthood, that they were voted like cattle, first for one candidate and then for another, all the time controlled by an unseen hand. . . . The members thus accused uttered indignant and fiery protests against these charges, which were denounced as absolutely false. . . . For two hours the assembly was tossed and swayed by the storm of excitement, and the final scene, ending in the announcement of Rawlins's election, was one of such wild frenzy, such dramatic, almost tragic, features, as to almost beggar description."—"Salt Lake Herald," quoted in *Annual Cyclopædia*, 1897. Two years later the session of the Utah legislature was declared "notable for exhibitions of bad spirit between the members, charges of bribery and personal conflicts." In the Montana legislature of 1899, the Clark and Daly factions "indulged in a war of words, and the lie was exchanged by several. Personal and political feeling ran high, and Ex-Speaker Kennedy was knocked down because of some remarks concerning bribery charges."

to suggest that amid scenes like these the choice of a senator retains anything of the character of an exercise of cool judgment. The contest has become a fight to the finish, in which it is but natural that high-minded discriminations as to weapons or tactics should fall into abeyance. The victory is to be won at all hazards.

Whenever men's passions are aroused to the highest pitch, the fighting instinct asserts itself in its most primitive forms; though whether the blow follows hot upon the reply churlish, or awaits the lie circumstantial, or even the lie direct, seems to be somewhat a matter of latitude and longitude. The passion stirred by these senatorial deadlocks has led not merely to an occasional assault and to fist-fights of the mob, but to threats of organized attack and resistance, and to the reign of martial law. In recent years, Colorado has been peculiarly subject to fraudulent elections. In 1891, a dispute having arisen as to the election of speaker, two house organizations were effected, each claiming to be the legal house. A dozen years later, in 1903, upon the face of the returns, the House was Republican by a majority of seven; but hold-over senators made that body Democratic by a majority of thirteen, and gave the Democrats a majority of six on the joint ballot. The majority in each house thereupon proceeded, on the charge of fraudulent elections, to attempt to unseat enough of its own members to secure for its party the control of the joint assembly which was to elect a senator. Since the Democrats had at their back the police of Denver, the Republicans, in turn, through their presiding officer, appealed to the governor for troops to support him in his attempt to recognize the thirteen

Republicans as the Senate. That the official recognition of the Democratic Senate as the legal body, and the assembling of all the Democrats in a joint session, in which a bare majority of the legislature took part, made possible the prompt election of a senator must not disguise the violence of the struggle nor the near approach to anarchy to which it led.<sup>3</sup> Many circumstances combined to make the Kentucky contest of 1896 particularly exasperating. Feeling ran so high that during the last week of the session weapons were much in evidence. Assaults and threats of bloodshed became so frequent that the governor felt forced to call out the militia, and for three days the legislature met in a capital filled with troops enforcing martial law.<sup>4</sup>

<sup>3</sup> *Independent*, Vol. 55, p. 278 (Jan. 29, 1903); *Outlook*, Vol. 73, p. 234 (Jan. 31, 1903).

<sup>4</sup> The Frankfort correspondent of the *Courier-Journal* gave this account of the situation of March 14: "There was not a score out of the 132 members at Saturday's session who did not have one or two pistols concealed, to say nothing of knives and other weapons. Even peaceably disposed legislators were tempted to arm in self-defense, and both parties had chosen leaders on the watch at commanding points about the hall. James Walton, whose presence was obnoxious to the Democrats, was placed among Republican associates, and one of the most fearless of the party, well armed, was deputed to open fire on any one who attempted to molest them. The Democrats had several trustworthy men in a position to cover this Republican in case of a signal for close action. The Democratic leader, seated in the center aisle, near the door, was another storm center." It was on the basis of such reports that the governor, much against the will of the legislature, called out the militia. "Two days later," says the *New York Tribune* (March 16, 1896), "it was the turn of Rev. Mr. Cooper, the chaplain of the penitentiary, to open the House with prayer. At first he was stopped by sentries, when trying to enter the building. He said: 'It is my morning to open the House with prayer, but I will not do so. I refuse to dishonor

## B. BRIBERY AND CORRUPTION.

How often, in connection with senatorial elections, resort has been had to bribery or to the corrupt pledge of office, it is impossible to determine. This much is certain, that in not less than seven States, during the past fifteen years, charges of corruption have been put forward with enough of presumptive evidence to make them a national scandal. In Ohio, California and Montana the charges were made the subject of formal inquiry by the legislature, and, in each case, the majority of the committee of investigation declared that the evidence of the corrupt use of money was conclusive. In the Ohio case the responsibility for the corrupt solicitation was not fixed upon the senatorial candidate. The Montana candidate, by the report of the Senate committee, was held responsible for unwarrantably large expenditures in connection with the election. Whereupon, he promptly resigned his office without awaiting the action of the Senate upon the report, and, at the next session, the Montana legislature forthwith

God while Kentucky is being dishonored. The House can do without prayer this morning, so far as I am concerned.' That day, in the joint ballot, only one man voted. At the final roll-call of the session, two days later, not a senator answered to his name, and only two members of the House voted. 'Mr. Howard moved that the session be dissolved 'everlastingly, eternally and forever.' His motion was carried with a wild yell. A member started up the Doxology, and the crowd in the lobby joined in.' Senator Blackburn seemed satisfied with his achievement in blocking an election at that session, and made a speech in which he declared: "There has not been one single line original, copied, borrowed or stolen in the Democratic press of Louisville for the last three months, which was not a lie."—*New York Tribune*, March 18, 1905.

“vindicated” him, by reelecting him to succeed himself; and he took his seat without further protest. In California, the committee reported that more than \$20,000 had been expended by the manager of one of the candidates in order to secure the election of members of his party to the legislature; the speaker of the House was specifically charged with having accepted gifts and loans from campaign managers while at the same time securing support from an influential newspaper by alleging that he was entirely unpledged. Under these charges he resigned, but was not prosecuted. In Utah, the majority report from the committee of investigation declared that one of the members had been improperly approached to secure his vote for a candidate, but that “the evidence did not establish an attempted bribery or other public offense.” Charges of bribery have been chronic in connection with Delaware and Pennsylvania senatorial elections, but they have not been subjected, in recent years, to formal investigation. In Connecticut, responsible parties have asserted that they are ready to lay before the United States Senate convincing evidence of the widespread corrupt use of money during the senatorial campaign of 1904 and 1905.

Such have been the most notable instances of alleged bribery and corruption in connection with the senatorial elections of the past fifteen years. But this subject cannot be dismissed without directing attention to the history of the action which the Senate itself has taken in the cases where charges of bribery have been laid before it with a view to invalidating the election of men claiming membership in its body. The popular notion of the prevalence of bribery in senatorial elections is

strengthened not a little by the fact that the Senate has shown extreme reluctance to investigate such charges, and has bound itself by precedents which make not only the unseating of a member, but even the pursuit of a thoroughgoing investigation, practically impossible, except where the evidence of guilt is overwhelming and notorious. There is indisputable proof that a number of legislatures have been tainted by bribery in the interest of senatorial candidates, and that this evil has not been lessened but rather increased since—if not by—the enactment of the law of 1866. For it is a significant fact that for nearly seventy years after the framing of the Constitution, not once was the Senate called upon to investigate a senator's election, the validity of which had been challenged because of alleged bribery or corruption. Ten senators have thus been brought to the bar of the Senate, the first of these unsavory cases having arisen in 1857. The record is as follows:

I. 1857. *Simon Cameron.* (Pa.)

Certain members of the Pennsylvania Legislature protested against the seating of Cameron on the charge, among others, that his election had been procured "by corrupt and unlawful means." The senate committee, to which these charges were referred, reported that the allegation was entirely too vague and indefinite to justify the recommendation of an investigation by the Senate. This report was adopted, although a minority of the committee dissented on the ground that, when a protest of this nature came from a respon-

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sible source, the Senate should investigate the charges and allow the persons protesting an opportunity to submit the evidence upon which the charges rested.

### 2. 1872. *S. C. Pomeroy.* (Kan.)

The Senate committee reported that the charges of bribery and corruption "totally failed to be sustained by any competent proof." No further action was taken. The following year Pomeroy's reelection in 1873 was challenged on an allegation of bribery. The committee reported that the charges were not sustained, since they were contradicted by direct evidence. No further action was taken, although a minority report from the committee held that the charges had been substantiated.

### 3. 1872. *Powell Clayton.* (Ark.)

The committee recommended the adoption of a resolution that the charges were not sustained. This was agreed to. A minority report contended that there was evidence that Clayton had secured votes both by the gift of money and of lucrative offices.

### 4. 1873. *Alexander Caldwell.* (Ark.)

The committee recommended the adoption of a resolution to the effect that Caldwell "was not duly and legally elected." After a long debate, but before a vote had been taken upon this resolution, Caldwell resigned his seat.

5. 1875. *George E. Spenser.* (Ala.)

The committee found the charges "not proven."  
The Senate took no further action.

6. 1877. *La Fayette Grover.* (Ore.)

The committee reported that the evidence taken did not sustain any of the charges.

7. 1879. *John J. Ingalls.* (Kan.)

Both the majority and minority reports exonerated Ingalls from personal complicity in bribery; but it was held to be proved that corrupt means "were made use of both by those favoring and by those opposing his election." The Senate took no further action, thus establishing a precedent, as noted below, which some have considered most unfortunate.

8. 1886. *Henry B. Payne.* (Ohio.)

Three reports came from the committee; two of them, signed by four and three members respectively, held that there had not been sufficient evidence presented to warrant an investigation; the third report held that an investigation should be made. By a vote of 44 to 17 the Senate decided to make no further investigation of the charges against Payne.

9. 1898. *M. A. Hanna.* (Ohio.)

A majority of the committee reported that there was no evidence that Hanna was elected by bribery; or that he authorized his agents to use

corrupt means, or that he had personal knowledge of the alleged bribery. In view of the fact that no demand for the further prosecution of the inquiry had come from Ohio, the committee asked to be discharged from further consideration of the matter. A minority report, signed by three Democratic members of the committee, held that facts had been disclosed which did call for further inquiry and investigation. The Senate took no action.

10. 1899. *W. A. Clark.* (Mont.)

The committee reported that Clark "was not legally elected," since, of his apparent majority of fifteen, more than eight votes had been obtained through illegal and corrupt practices. The report was debated at length in the Senate; before it was acted upon, Clark resigned his seat, after making a strong speech in his own defense. (May 15, 1900.)

In the lifetime of a single generation, thus, the Senate has had to deal with nine cases of alleged bribery, while only one had arisen in all its earlier history. A reading of the reports of the investigating committees leaves no question that in most instances not a desire for truth and justice, but party policy determined the bringing of the charges and the zeal with which they were pressed. Although the majority reports exonerated the accused in eight cases, or rather, asserted that the evidence did not warrant further action, in all but two out of the ten, guilt seemed probable, at least, to a

minority of the committee. In every one of the four cases which have occurred within the past twenty-five years there has been no question whatever that bribery was at least attempted, if not carried out. It is true that verdicts of "not proven" have been given by the majority report in most cases; that no senators have been expelled for bribery, and that only two have resigned in consequence of these investigations. Yet this statement gives a better impression than is warranted by the facts.

In the first place, the Senate finds no warrant for investigating and no possibility of punishing corrupt practices in a state legislature by or in behalf of a candidate who does not secure enough votes to claim an election. These investigations, therefore, do not include many of the most flagrant instances of recent corruption in senatorial contests, as in California and Delaware. Moreover, the scope of the Senate's action has been still further narrowed by the Senate's accepting as binding precedent, the principles laid down in the Ingalls case, that in order to invalidate a claim to a seat it must be proved by legal evidence (1) that the claimant was personally guilty of corrupt practices, or (2) that corruption took place with his sanction, or (3) that a sufficient number of votes were corruptly changed to affect the result. That the Senate's refusal to follow up an investigation or to expel a member is not always the equivalent of giving a clean bill of moral health to the legislature or to the senators may be inferred from the outcome of the Payne case. Henry B. Payne took his seat as senator from Ohio in 1885. Forthwith, there was presented to the Senate the report

of a special committee of the Ohio House of Representatives appointed to investigate charges of bribery against four of its members in the session when Payne was elected; next there were presented to the Senate memorials from both the Senate and the House of the Ohio legislature and from the Republican state committee, representing that the election of Payne had been procured by bribery and corruption. Representations to the same effect came from a convention of Republican editors and from numerous citizens of Ohio. The ten Republican members of the national House of Representatives from Ohio added their earnest request for an investigation. The senate committee examined the testimony submitted from the Ohio legislative committee, and gave hearings to two Ohio congressmen in advocacy of further investigation; but by a large majority the committee reported against such action, in spite of the fact that two Ohio congressmen, one of whom had lately been attorney-general of that State, offered to prove that three-fourths of the Democratic members of the Ohio legislature in question had been positively pledged to two other candidates, an absolute majority of the number having been pledged to Pendleton; that Payne was nowhere publicly spoken of or known as a candidate during the popular election of members of the legislature nor until a very short time before the election of a senator by the legislature; that just before the legislative nominating caucus, a week before the election, large sums of money were placed by Payne's son and intimate friends of his in the control of his active managers; that members of the legislature who changed from Pendleton to Payne did so after secret and confi-

dential interviews with the agents who had the disbursement of this money; that such members, at about the time of the change, had acquired large sums of money of which they gave no satisfactory account; that Payne's son and a friend of his each had made statements that the election had cost many thousands of dollars; and that there was specific evidence leading to the conclusion that votes had been changed corruptly in the case of each of ten members—a number more than sufficient to determine the result of the election in Payne's favor.

In view of the offer on the part of such responsible parties to substantiate charges of so grave moment, two members of the committee, Senators Frye and Hoar, protested earnestly against the Senate's refusal to pursue the investigation further, claiming that the precedent would be most unfortunate, if the Senate thus should show itself unwilling to make inquiry for its own protection, when the honor of one of its members was so strongly impugned. But this protest was of no avail.\*

#### C. VACANCIES IN THE SENATE.

As the end of a session of a state legislature approaches, the efforts to secure the election of a senator at all hazards become more and more desperate.

"In vain, in vain, the all-consuming hour  
Relentless falls."

But, since 1890, in ten States, the parting knell has

\* Details in regard to these and other election contests may be found in G. S. Taft's *Compilation of Senate Election Cases* (edition of 1903).

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struck for the legislatures, leaving fourteen seats in the Senate vacant, as follows:

California, 1899.

Delaware, 1895; 1899; two in 1901; 1905.

Kentucky, 1896.

Louisiana, 1892.

Montana, 1893.

Oregon, 1897.

Pennsylvania, 1899.

Utah, 1899.

Washington, 1893.

Wyoming, 1893.

How has the membership of the Senate been affected?

In the case of Louisiana, by reason of the long term of the legislature, it was possible to make the election at the next regular session before the seat actually became vacant. In all the other cases, the State had to face the gloomy alternative of having but one representative on the floor of the Senate, or of undergoing the cost and trouble of convening a special session of the legislature, in which the deadlock might develop again and continue indefinitely, as in Kentucky in 1897. To be sure, in five States an attempt was made to avoid this disagreeable dilemma by means of recess appointments by the governor; but, following the unbroken precedent of three-quarters of a century, the Senate refused to admit to its membership men who had been appointed by the governors of their several States when the legislatures had had an opportunity to fill the vacancies, but had failed to do so by reason of deadlocks. The Senate thus passed upon and excluded Mantle of Montana, and Allen of Washington, in 1893; and

before these cases were fully decided, Beckwith, the gubernatorial appointee from Wyoming, had resigned. In like manner, Corbett of Oregon was excluded in 1897. In 1899, the appointment of Quay came with less force before the Senate, both because the contestant had himself voted against the recognition of men in similar position, and because his own appointment was made in defiance of the provision in the Constitution of Pennsylvania, which specifically directs the governor to call the legislature together in special session whenever a vacancy occurs in the State's representation in the Senate. In view of the exclusion of Quay, the governor of Delaware made no appointment, and the recess appointee from Utah announced that he would not present his credentials.\* In three of the States, the alternative of a special session was chosen. In Kentucky, the legislature was in session nearly seven weeks. The deadlock again developed immediately, and lasted from week to week. For four days a quorum was prevented, but, at the last, Deboe, who had been nominated only five days before, was elected. In Oregon, the State had been too outraged by the fiasco made by the legislature at the time of the regular session to tolerate any dilatoriness, and an election was effected on the fourth day. In California, the special session lasted thirteen days. What these sessions cost the States either in money or in the derangement of public affairs it is impossible to compute with accuracy. Each day of a legislative session, however, is an expensive luxury. In Tennessee, in January, 1898, it

\*G. S. Taft, *Compilation of Senate Election Cases* (edition of 1903).

became necessary to convene a special session to fill a vacancy caused by the death of a senator and to attend to a few other matters. It lasted from January 17 to February 5, yet Tennesseans estimated that it cost the State \$20,000. In California, \$960 is the amount each day due for the payment of members alone, to mention none of the other expenses of the session. Indeed, in general, it would be a low estimate to say that each day of a special session costs the unfortunate State not less than \$1,000.

Six States have accepted vacancies in the Senate as the penalty of their legislatures' failure to elect. The duration of the vacancies varied somewhat, but, in most instances, it amounted to the loss of a senator for the entire term of a Congress; for the senator's service could amount to little, when he was seated only within a month of the end of the last session. These are the States which have thus suffered:

FIFTY-THIRD CONGRESS.

State.	Date.	Date.
Montana.	March 4, 1893.	February 2, 1895.
Washington.	March 4, 1893.	February 19, 1895.
Wyoming.	March 4, 1893.	February 6, 1895.

FIFTY-FOURTH CONGRESS.

Delaware.	March 4, 1895.	February 5, 1897.
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FIFTY-FIFTH CONGRESS.

Oregon.	March 4, 1897.	December 5, 1898.
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FIFTY-SIXTH CONGRESS.

Delaware.	March 4, 1899.	March 3, 1901.
California.	March 4, 1899.	March 5, 1900.
Pennsylvania.	March 4, 1899.	January 17, 1901.
Utah.	March 4, 1899.	February 4, 1901

## FIFTY-SEVENTH CONGRESS.

State.	Date.	Date.
Delaware.	March 4, 1901.	March 3, 1903.
Delaware.	March 4, 1901.	March 3, 1903.

## FIFTY-NINTH CONGRESS.

Delaware.	March 4, 1905.
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The record of seven Congresses, therefore, shows that only one has not had its Senate cut down by vacancies due to deadlocks in state legislatures. In three Congresses, there has been one such vacancy; in one, two; in one, three; and in one, four. Since 1895 there have been but two Congresses in which Delaware has had the representation to which she is entitled in the Senate, and in the Fifty-seventh Congress she had no part whatever in the Senate's deliberations.

## D. MISREPRESENTATION OF STATES IN THE SENATE.

As regards the State's representation in the Senate, the method of election has not only resulted in the loss to the State of a half or of all of the representation to which it is entitled, and to secure which was the object of pertinacious struggle in the Convention, but in not a few cases it has resulted in positive misrepresentation of the political elements of the State, in flagrant violation of the fundamental principle of democracy that the majority shall rule. This criticism is not to be passed upon all elections which result in the choice of a senator of a different party from the one which would have triumphed at the polls. If the popular majority would have been carried away by the whim of the moment, and if holdover members of the state senate or the conservatism of the legislature as a whole

—which may have been elected two or three years before—prevents the election of the “man in the saddle,” it may be a matter of congratulation. But no such satisfaction can be derived from the spectacle of a factional fight in the legislature resulting in sending to the Senate for six years a man representing a party that is in distinct minority in the State. While it is true that the strife of factions might result in the choice of a minority candidate under another method of election, it cannot be disputed that in the opportunities opened up by a prolonged deadlock in the legislature the chances of such minority successes are vastly increased. In the very year when the legislatures of Montana, Washington and Wyoming wrangled away their entire sessions without electing senators, and thus left their States with crippled representation in the Senate, the neighboring States turned out anomalous and hardly more satisfactory products. North Dakota, a Republican State with a Republican legislature, returned a Democratic senator, while Kansas elected a Democratic senator, although the Legislature contained only a handful of Democratic voters.<sup>7</sup>

<sup>7</sup>It is true that in both these States party lines were badly blurred in 1893. The extent to which fusion had been carried may be seen from these figures:

Parties.	NORTH DAKOTA.		
	1892. Vote for President.	1893. Joint Ballot in Legislature.	Result.
Republican.	17,486	50	
Democratic.	.....	23	
People's.	17,650	..	Elected a Dem.
Independent.	.....	14	
Dem. Independent.	.....	8	
Rep. Independent.	.....	3	

In other cases, a far different representation may result from the legislative election of senators than would be given by popular election because of the scheme of representation peculiar to the individual State. Thus, it is not without significance that since 1865 Connecticut has had thirteen Republican governors, serving twenty-seven years, and five Democratic governors, serving thirteen years;<sup>8</sup> in four presidential elections—1876, 1884, 1888 and 1892—the State was carried by the Democrats; but during all that period of forty years, she has had only two Democratic senators, and these were elected in the years 1875 and 1876, for a single term each.

#### E. INTERFERENCE WITH STATE BUSINESS.

Entirely aside from any effect upon the quality or political character of the State's representation in the Senate, are certain results of grave significance for the individual state legislature. It is no exaggeration to say that there is never a long contest over a senatorial election which does not do serious harm to the interests of the Commonwealth which its lawmakers are chosen to guard. The injury may seem to consist simply in the consumption of the time required for the

##### KANSAS.

Parties.	Vote for President.	Joint Ballot		Result.
		1892.	1893.	
Republican.	157,241		79	
Democratic.	.....		2	
Prohibitionist.	4,553	..		Elected a Dem.
People's.	163,111		84	

\* 1867-1869, 1870-1871, 1873-1877, 1877-1879, 1883-1885, 1893-1895.

ballots, and in the developing of political excitement which would not otherwise have arisen. But each of these may involve consequences of grave import. Each ballot takes a very considerable amount of time, and when the session is limited to forty or sixty days, the inroads thus made upon the legislature's hours curtail very materially the time which is available for its normal work in the service of the State. As the session wears on, the animosities engendered in the deadlock cannot be laid aside when the joint assembly adjourns from day to day: they project themselves into the ordinary work of the lawmaking body, giving a party color to the most non-partisan measures, distorting the legislator's views of many of the state issues and preventing the straightforward carrying on of the normal work of the legislature. This interference may vary through wide degrees of seriousness. Almost plaintive is the resolution, adopted just before the taking of the twenty-second ballot in the joint assembly of a State which had suffered sadly from these trials:<sup>9</sup>

"WHEREAS, The duty of electing a United States senator, while of great importance, is not the sole and only duty of the Legislature, and there are many other matters and things of vital interest to the people to be considered and determined during the brief constitutional life of this body, and

WHEREAS, There is apparently no reasonable ground for the belief that the pending senatorial contest will be ended within the short time and the tedious repetition of ballots brings the Legislature no nearer the desired consummation, therefore be it

*Resolved*, By the Legislature of the State of Washington in convention assembled: That during the pres-

<sup>9</sup>January 20, 1903.

ent sitting of this body and hereafter during the present session, when convened for the present purpose, the Legislature shall take two ballots—and thereupon dissolve the joint session and endeavor to do some other business of the State."

Most impressive of all, in its warning of what senatorial election contests may mean for a State, is the experience of Oregon in 1897. The constitution of that State requires the presence of two-thirds of the members elected to each house, before that house can effect its organization. A forecast of the probable result of a ballot in joint assembly led to a sufficient number of the members of the lower house absenting themselves to prevent its completing its organization. Early in the session, a perfunctory attempt was made each morning to convene the House: the regular record of proceedings reads: "At 12 o'clock, the committee on credentials not having reported, on motion *a rest was taken* until 2 P.M.," at which hour the attempt was given up for that day. Thus the headless house continued taking rests throughout the session. Oregon's domestic legislation was at an absolute standstill. Not a bill of any kind could be passed, not even an appropriation for current expenses, so that while the regular taxes were bringing in a revenue, for fifteen months or more the bills of the State had to be paid in warrants drawing interest at eight per cent. Such is the inglorious record of this American "Addled Parliament," a legislature "powerless to be born," its wretched plight being due not to any interference by a Stuart king, not to any paralyzing political issues which the people of the State could not decide, but simply and solely to the power

for mischief which our method of electing senators placed in the hands of a man whose arrogant ambition could relinquish no slightest chance of winning a seat in the Senate, no matter how great the injury done his State—a man who came to an inglorious end under sentence of imprisonment for having received money for using the influence of his high office for the furtherance of land frauds against the United States—the man, than whom, by the irony of fate, the Senate has never known a more persistent and tireless advocate of the election of senators by the direct vote of the people.<sup>10</sup>

#### F. CONFUSION AND CORRUPTION OF STATE AND LOCAL POLITICS.

Not only does the State suffer through the interruption of its normal legislative work, but the election of senators injects into state politics an incongruous and disorganizing element. There can be no question that this is one of the strongest influences which tend to

<sup>10</sup> *The Journal of the Legislative Assembly of Oregon* is published as *Senate Document*, 55th Cong., 1st Sess., No. 62. Of course it was never possible to read and approve the journal, since the House was never organized, but a committee was appointed to examine, correct and approve it. On a number of days bills were "read the first time and passed to a second reading without question" and petitions were introduced "by unanimous consent," but no further action upon them was possible. The forty-day session began early in January, 1897. By a decision, rendered August 10, 1897, the Supreme Court of Oregon ordered the secretary of state to audit claims and draw warrants for all claims which the legislature had, through its enactments, permitted and directed either expressly or impliedly. Some discussion of this annihilation of the legislature is to be found in a speech of Mr. Tongue, of Oregon, in the National House of Representatives, May 11, 1898.—*Congressional Record*, Vol. 31, p. 4819.

submerge state parties and to subordinate local issues, of however great importance. These effects are not to be gauged quantitatively by statistics, but they are matters of the commonest observation and of the utmost significance. Not only may an impending election of senator throw every consideration of state affairs into the background in the election of members of the legislature, as in Connecticut during the summer and autumn of 1904—it may even subordinate all interest in a presidential campaign. "This year, the question in Delaware is not 'Roosevelt or Parker?' but 'Addicks or no Addicks?'" Whether these words are correctly attributed to Mr. Addicks himself or not, there is not the slightest doubt that they stated the exact truth of the situation.

#### G. SUMMARY.

Forty years ago, Congress set about the task of improving upon the work of the fathers by prescribing a system of regulation, intended to correct the abuses which had arisen in connection with senatorial elections. Yet dissatisfaction with the working of the system has steadily increased. What, in brief, have been the reasons for this? The experience of the past fifteen years makes reply: Not a few, but at least half the States of the Union, belonging to no isolated section, but States scattered the country over, from Delaware to California and from Montana to Louisiana, have suffered from serious deadlocks. These fierce and prolonged contests, the outcome of which was often as much a matter of chance as is the throw of dice, aroused men's worst passions, and gave rise, now to insistent charges of bribery, now to turbulent and riotous

assemblies, to assault and to threats of bloodshed, such that legislative sessions have had to be held under the protection of martial law. Fourteen contests in ten States have lasted throughout an entire session of the legislature without effecting an election. Four States have submitted to the heavy cost and inconvenience of special sessions to elect senators. Six States have preferred to accept vacancies as the penalty for their legislatures' deadlocks, and have thus been deprived of their "equal suffrage in the Senate;" while the country at large has been deprived of a Senate constituted as the fathers intended. In the Fifty-third Congress, three seats were vacant; in the Fifty-sixth, four. Not only has the working of our system brought it about that some States have been but partially represented, while others have been without voice altogether, but at times it has led to positive misrepresentation in the Senate; while, to the individual State, it has brought a domination of the whole range of state and local politics by this fierce fight for a single federal office, and interference with the normal work of state legislation, ranging all the way from the exaction of a few hours of the legislature's time to the virtual annihilation of the legislature, which was chosen to guard the interests of the State. Experiences such as these, exceptional though they still are, have nevertheless become so frequent and so widespread that in recent years they have given rise to a determined propaganda, which no longer contents itself with an attempt to correct obvious defects in the law by which Congress has regulated the election of senators, but which demands that these elections be placed directly in the hands of the people.

## CHAPTER IV

### THE PERSONNEL OF THE SENATE

IN an attempt further to find out what are the results of the method of election established by the Constitution and developed by Congress, it is desirable to examine the personnel of the Senate. It is true that the method of election is but one of a considerable number of causes which have coöperated to make the Senate what it is. It is likewise true that it is impossible entirely to differentiate this particular cause and to estimate with precision its absolute or relative importance. Nevertheless, to put the matter negatively, an examination of the personnel of the Senate will disclose types of senatorial candidates which are not repugnant to their constituencies, the state legislatures. Furthermore, such an examination cannot fail to reveal certain effects upon the Senate which are positively, though in varying degree, attributable to conditions inherent in the process of its members' election by state legislatures.

For these purposes, an examination has been made of the membership of five Congresses, from the Fifty-fourth to the Fifty-eighth. No account has been taken of changes in the Senate made later than the end of the first regular session of the Fifty-eighth Congress. Nearly all the data here used have been derived from the biographical sketches which appear in the official Congressional Directory, sketches either written by

the senators themselves or compiled from data which they furnish. In either case, they afford interesting testimony as to the individual senator's opinion of the qualifications and experience which have fitted him for his high office, and of the services or political accidents which have made him an available candidate in the eyes of the members of the legislature by whom he was elected.

In these five Congresses, there have served, in all, 159 senators, making an average of between three and four from each State. Six States made no change in their senatorial representation during these Congresses covering a decade; namely, Maine, Massachusetts, Rhode Island, Connecticut, Virginia, and Wyoming. It will be noted that four of these are New England States. In one other State of that conservative section, it is probable that no changes would have been made but for the death of a senator of long and distinguished service. On the other hand, Kansas, Mississippi, Nebraska, Utah and Washington have each elected five senators; yet this exceptionally large number does not necessarily indicate political instability or inconstancy.

Of the whole number of senators, eighty-one have been Republicans, ninety-five Democrats, nine Populists, two "chameleons,"<sup>1</sup> one Independent and one

<sup>1</sup> This term is here applied to two men, whose names have been listed with several parties during their service in the Senate. While one of them has seemed changeable and ready to fish in all waters, of the other it may perhaps be said that, upon the issue which he has thought the dominant one, he has shown greater consistency than any of the parties with which he has been temporarily listed, and that, like Burke, "he changed his front, but he never changed his ground."

"Union" Republican. In the several Congresses, the proportionate strength possessed by the principal parties in the Senate and in the House is indicated by the following table:

PROPORTIONATE PARTY STRENGTH IN THE  
SENATE AND IN THE HOUSE.

FIFTY-FOURTH CONGRESS.

Years.	Party.	—Senate—		—House—	
		Number.	Per Cent.	Number.	Per Cent.
1895-7.	Republican.	42	48.8	246	68.9
	Democrat.	39	45.3	104	39.1
	Others.	5	5.9	7	2.0

FIFTY-FIFTH CONGRESS.

1897-9.	Republican.	46	51.1	206	57.9
	Democrat.	34	37.8	134	37.4
	Others.	10	11.1	16	4.5

FIFTY-SIXTH CONGRESS.

1899-1.	Republican.	53	58.9	185	51.8
	Democrat.	26	28.9	163	45.7
	Others.	11	12.2	9	2.3

FIFTY-SEVENTH CONGRESS.

1901-3.	Republican.	56	63.6	198	55.6
	Democrat.	29	32.0	153	42.9
	Others.	3	3.4	5	1.4

FIFTY-EIGHTH CONGRESS.

1903-5	Republican.	58	64.4	206	53.9
	Democrat.	32	35.6	174	45.6
	Others.	0	0.0	2	0.5

Variations such as these are in large part, of course, a result of the longer term of office in the Senate. Six years may enable a senator to survive a political flurry which has produced radical changes in his State's delegation in the House. But the political complexion of the Senate is materially affected also by the election of its members by the legislature, which, from the system

of representation peculiar to an individual State, may give one party a far greater advantage over its opponents than it would possess in a popular vote. Thus, in States containing large urban communities the disproportionate weight given to each local unit, regardless of its population, in the legislatures, as in Connecticut and Rhode Island, redounds to the distinct advantage of the Republican party in senatorial elections.<sup>2</sup>

Of the 159 senators, all but twelve were native-born citizens of the United States. Of these twelve, four came from England, four from Canada, two from Ireland, and one each from Norway and Germany. Ohio may claim to be the mother of senators, as well as of Presidents, for she heads the list with seventeen of her sons. By a strange coincidence, every one of the four men who have served Indiana in the Senate during these ten years was an Ohioan by birth.<sup>3</sup> Next stands New York with thirteen, Pennsylvania with eleven, Kentucky with nine, Mississippi and Vermont with seven, Tennessee and Virginia with six, and Massachusetts Georgia and South Carolina with five each. That many of the comparatively new States have not as yet elected men born within their territory is not surprising; but it is strange that all the senatorships of such old States as Arkansas, Colorado, Florida, Iowa, Kansas, Minnesota, Nebraska and Nevada, in this period

<sup>2</sup> *Supra*, p. 65.

<sup>3</sup> That Ohio has been exceptionally prolific in lawmakers has been shown by the writer in a study of the state legislatures of 1899 (*Representation in State Legislatures*), in which it was found that sons of Ohio outnumbered by far any other outsiders in the legislatures of the other North Central States.

of ten years, should have gone to adopted sons. On the other hand, thirteen States elected only favorite sons; and, not unnaturally, most of these were from the more conservative sections of the country; that is, three were from New England (Massachusetts, Maine and Vermont); four were from the North Atlantic States (New York, Pennsylvania, Delaware and Maryland); and five were from the South (Georgia, Louisiana, South Carolina, Tennessee and Virginia).

In studying the qualifications which conduce to election by legislatures, the first point to be noted as to the age of senators is the age at which they first enter the Senate. Many of these senators of the decade 1895 to 1905 had seen long periods of continuous service; four had seen earlier, but non-consecutive service. In each case, therefore, the age of the senator at the time when he was first chosen is taken into the reckoning. Of the 158 men who served in the upper house by election during these five Congresses, the average age, at the time of election, was precisely forty-nine years. In any given Congress, the ages vary from close to the minimum limit of thirty prescribed by the Constitution, to a maximum well past four score. Thus, Senator Beveridge entered the Senate at thirty-six, and Senator Bailey at thirty-seven, while Senator Morrill died in service in his eighty-ninth year. During the second session of the Fifty-eighth Congress, in 1904, the average age of the members of the Senate was 59.8 years. But such an averaging of ages does not go far toward showing the extent to which, in choosing our senators, the legislatures have sought old men for counsel; that can be shown only by grouping

the members according to their ages. Thus, in the Fifty-eighth Congress, of the ninety senators:

8 were between 40 and 45 years of age,  
6 were between 46 and 50 years of age,  
18 were between 51 and 55 years of age,  
15 were between 56 and 60 years of age,  
15 were between 61 and 65 years of age,  
15 were between 66 and 70 years of age,  
8 were between 71 and 75 years of age,  
5 were between 76 and 80 years of age.

In America, educational standards are of the most diverse. In the biographical sketches many senators are reported to have received an "academic" education, but the meaning of that term is sufficiently vague to cover a wide range of training. Out of the 159 senators, precisely one hundred reported that they had been enrolled for a time at some "college" or "university," or institution of similar rank, including in this generous grouping, professional schools of law and medicine. Sixty different institutions of varying reputation were represented, the vast majority, of course, claiming but a single senator. The list is headed by Yale and the University of Virginia, each of which has helped educate nine senators. Next comes Harvard, with six; and Dartmouth and the University of Michigan with four each. Of those who have not received the blessings of an "academic" education, not a few take pains to lay modest emphasis upon the fact that they had had only the opportunities afforded by the public schools.

Of considerably greater interest and significance, as affecting the canons of choice, is the question of military service. That an aspirant's military record counts

for much, is evidenced by the particularity with which it is set forth in the biographical sketches. Significant also is the sectional grouping of the soldier senators. Of the 159, there are fifty-one who had seen service in the Civil War: twenty-three in the Union, and twenty-eight in the Confederate army. Included in the latter number, are three who were also veterans of the Mexican War, ended fifty years and more before their recent service in the Senate. That, particularly in the South, a candidate's military record goes far to commend him, is shown not simply by the fact that the number of such senators is much larger in proportion to population than in the North, but by the fact that often exclusive choice has been made of such leaders of a former generation and of a lost cause. This is the case in Alabama, Florida, Mississippi and Virginia. In the other States, they have been chosen in the following proportions: Arkansas and Georgia, two out of three; Tennessee and Kentucky, three out of four; Louisiana, two out of four; Texas, one out of four, and West Virginia, one out of two. As to the Union veterans in the Senate, the most significant fact is that of their very restricted territorial distribution. With a single exception, all twenty-three of them came from but six States, belonging to the central group. The soldier senators have, moreover, been chosen in such proportions as to indicate that their selection is more than a coincidence; that their patriotic service is still held in grateful remembrance; or, perchance, that the soldier-vote can best be called out for a candidate who has himself known the hardships of war, and who may therefore be relied upon to favor liberal legislation as to pensions. These

Union veterans were distributed as follows: Connecticut and West Virginia, one out of two; Nebraska, two out of five; Ohio, two out of four; Michigan and Minnesota, two out of three; while, in Wisconsin, every one of her four senators was a Union soldier. The contrast is indeed striking between the South, which chose twenty-eight ex-soldiers out of a total of thirty-seven senators from that section, and all the other States, which chose but twenty-three out of 131. Moreover, it is evident that these Southern soldier-senators, as a rule, held higher rank in the service than did their Northern colleagues; that the Confederate army numbered among its officers many of the natural leaders of the South, in peace as well as in war; and that the two score years that have passed since the close of the conflict have not impaired the gratitude in which their services and sacrifices are held.

From what walks in life is the Senate recruited? Of the 159 senators, 101, or practically two-thirds, were lawyers by profession. In state legislatures, the lawyer element is one of the largest, in many States outstripping any other. It is, therefore, but natural that, in the United States Senate—the members being thus chosen largely by lawyers and for the business of law-making—the legal profession should predominate.<sup>4</sup>

<sup>4</sup> In the New England and North Atlantic state legislatures of 1899 lawyers constituted 27.4 per cent. of the membership of Senates and 11.8 of the membership of the lower houses, or 14.3 per cent. of the whole group of 2207 legislators. The proportion of lawyers was considerably higher in the legislatures of the Central and especially of the Southern States; in the four States of Louisiana, Arkansas, Mississippi and South Carolina, rising as high as 58.1 per cent. in the Senates and 31.9 per cent. in the Houses, or 38.5 per cent. in the entire group of lawmakers.

In popular classifications, the next group in point of numbers would be public officials: this consisted of eleven. The heading is unsatisfactory, for it includes a number whose activities, through a series of terms in the Senate, have been so monopolized by that service that they have gotten out of other occupations. It by no means implies that they are mere feeders at the public crib. Banking comes next with eight, and journalism with seven. Mining claims four, and various forms of agriculture, eight. Four are set down as capitalists, most of them retired from active business. Transportation claims four. Five were in mercantile employments, and four in manufacturing. One president of an insurance company, and one clergyman were in the list. The pessimist who, a few years ago, was bewailing the fact that "in both houses of Congress there was only one man who had written a book in stiff covers," may take heart at finding that that distinction has been attained by two members of the present Senate, although only one of these claims "literature" as his profession. Men of letters play a far more prominent rôle in legislative halls at London and at Paris than at Washington.<sup>5</sup>

\* OCCUPATION OF SENATORS.

Lawyers .....	101
Public Officials .....	11
Banking .....	8
Journalism .....	7
Mining .....	4
Agriculture—	
Farmers .....	5
Planters .....	2
Stock-grower .....	1—8
Capitalists .....	4

## 80        The Election of Senators

If the list be scrutinized with a view to seeing in what degree it affords an adequate representation of the country's varied interests, a theorist who believes that, in a measure at least, those interests should be represented each by its own members, and in proportion to its own numbers, will point out several anomalies. First, there is the exceptional part which lawyers play in this representation. The second surprise could hardly fail to be at the scant sprinkling of those engaged in agriculture; and the insignificant number engaged in those characteristically American fields of enterprise, the manufacturing and the mercantile. The explanation doubtless is that, while the former are little skilled as politicians and are poorly supplied with the sinews of political war, the leaders in these branches of business are too engrossed with their own concerns to be willing to accept senatorial office; that in the Senate they have preferred to be "represented by counsel"

Transportation—		
Steamship Manager .....	1	
Railroad Presidents.....	2	
Express Company President.....	1—4	
Mercantile—		
Merchants .....	2	
Jeweler.....	1	
Coal and Iron.....	1	
Lumber .....	1—5	
Manufacturing—		
Manufacturers .....	2	
Car-builder .....	1	
Brewer .....	1—4	
Insurance .....	1	
Clergyman .....	1	
Literature .....	1	
Total .....	159	

—hence the presence of those who are recognized as railroad senators, oil senators, copper, silver, or lumber senators. Furthermore, in contrast, for example, with the House of Commons,<sup>54</sup> the Senate is chosen by a process which practically excludes from that body any members who are personally identified with, or who stand distinctively for, the great body of the wage-earners.

To what extent have the members of the Senate had previous legislative experience, and of what character has that experience been? It is to be remembered, of course, that the choice by legislatures has been but one of a number of causes which have influenced the selection of seasoned legislative timber for use in the Senate chamber. Since the relation between legislative choice and the personnel of the Senate is the point now under consideration, the question as to previous experience in the public service is asked in the case of each senator at the time when he was first elected to the Senate. Five of these 159 senators had served previous terms in the Senate; had then been retired for a time to private life, and had later reentered the Senate.<sup>55</sup> The following table presents the extent of the experience which these senators of five Congresses had

<sup>54</sup> "Perhaps the most significant and noteworthy fact connected with the new House is the tremendous increase in the number of Labor members. With John Burns in the ministry, and more than fifty members under the leadership of James Keir Hardie, in the Commons, labor, in the words of the *Clarion*, the organ of English labor interests, is no longer "on the doorstep." "Labor is inside, and something will happen."—*Review of Reviews* Vol. 33, p. 268 (March, 1906).

<sup>55</sup> Gordon of Georgia; Dubois of Idaho; Voorhees of Indiana; Blackburn of Kentucky, and Smith of New Jersey.

## 82            The Election of Senators

had in the lower house before their election to the Senate.

### EXPERIENCE OF SENATORS IN THE HOUSE OF REPRESENTATIVES.

Congresses .....	1	2	3	4	5	6	7	8	9	10
Senators .....	12	15	9	6	6	4	2	0	2	1

It appears that, of the 159 senators in question fifty-seven, or 35.9 per cent. had served in the lower house. Where members of the House of Representatives were chosen, an experience of a considerable number of terms seems to have given them either that skill in the law-maker's craft which commended them as candidates before the legislatures, or that training in the arts of the politician which secured them the election over less adroit or less practiced winners of votes. No one of the senators from California, Nebraska, Oregon or Pennsylvania in these five Congresses had ever seen service in the lower house. On the other hand, every one of the senators from Maine, Massachusetts and Iowa had served a long apprenticeship of from three to six terms in the House. The exceptional influence, quite out of proportion to their population, which these three States have exercised in the Senate, is to be attributed, in no slight measure, to such preliminary training and to the long continuity of service which they have accorded to their senators.

A more largely attended preparatory school for senators has been the state legislatures. Just one-half of the senators in these five Congresses had profited by such instruction. To make the data more precise, of the eighty senators who had been members of state

legislatures, forty had served in the lower house only, twenty-four in the state Senate; while sixteen had "taken the entire course"—had been members of both houses. Once more, it is to be suggested that this earlier experience had fitted them not only for the work of lawmaking, but also for the expert manipulation of elections from the legislatures of which they themselves had been members.

State governors have frequently been chosen as senators. Of the 159, twenty-eight, or 17.5 per cent., had served as chief magistrates of their States. This includes two territorial governors, who, of course, received their office not by election, but by appointment—Senators Squire of Washington and Warren of Wyoming. The promotion from the governor's chair to the Senate seems much more the normal order in some sections than in others: thus, of the senators from the North Atlantic States, only four had been governors; from the North Middle States, nine; from the Western States, four; while from the Southern States there were eleven. Of these twenty-eight governor-senators, seventeen were veterans of the Civil War, and of the remaining eleven all but four were too young for enlistment. Every one of the eleven Southern senators who was old enough to do so, served in the Confederate army. This fact may raise the question, whether service as governor in itself has commended these men as senatorial candidates, or whether both honors have not been conferred upon them as a reward for patriotic service long since rendered. Twenty-two of these twenty-eight had had no experience in Congress, but eighteen had been members of state legislatures, while

five had served both in the state legislature and in Congress.

Other offices were well represented. Twelve had been judges, either in the federal or state system, some of the latter serving by election and some by appointment. Six had been attorney-generals of their respective States. Three had been secretaries of state; two, state treasurers; fourteen, members of state constitutional conventions; five had been members of the cabinet, three of them acting as secretaries of war. Twenty-nine, or 18.8 per cent., of the senators had performed the arduous duties pertaining to the office of presidential elector: nine of this number had been governors.

Highly significant is the stress which these biographical sketches lay upon the services which these senators had rendered to their respective political parties. Fifty-six mention the fact of membership in some national party convention, and fifteen claim membership in national party committees; nineteen record the fact that they have presided over state party conventions; eight take pains to specify even service upon state party committees.

Sixteen of the senators mention no service of any prominence in any civil office, national, state or local, but do lay emphasis upon the work they have done for the party. The list is a varied one, containing senatorial timber that may be considered good, bad, and indifferent. It is as follows:

Ankeny,	Brown,	Dryden,
Bard,	Call,	Fairbanks,
Brice,	Clark,	Hanna,

Heyburn,	Pettus,	Sullivan,
Morgan,	Smith,	Taliaferro,
	Teller.	

It is noticeable that this acceptance of candidates on the basis of party service, rather than experience in public office, seems to be more characteristic of the South and of the West than of the North and East, and that certain States seem to be particularly addicted to the habit. Half a dozen of these senators make it their boast that they had never held public office until elected to the Senate. A few senators came to their high office with no previous experience in the public service and with no party claims that they have cared to mention. Such are the following:

Beveridge,	Kittredge,	Smoot,
Cockrell,	Martin,	Turley,
Foster, A. G.	Smith.	

Of the 159 senators, fifteen made their first entrance to the Senate upon appointment by governors for unexpired terms caused by the death or resignation of the previous incumbents, serving only until their seats should be filled by legislative elections. At the ensuing sessions of the legislatures, all but two of these fifteen were forthwith elected. In one case, Senator Ross of Vermont, the appointee was over seventy years of age at the time of entering the Senate, and his appointment was probably considered complimentary; in the other case, although Senator Chilton of Texas failed to secure an immediate election at the hands of the legislature, his biographical notice significantly records that two years later he made a canvass of the State—after

which he was elected by the legislature without practical opposition. That so large a proportion of gubernatorial appointees should have received prompt indorsement from the legislatures in the form of regular elections to the Senate, indicates that, in these States, the executive and legislative branches of the government were in accord, but also that the governor not only knew how to forecast with accuracy the legislators' preferences, but was willing to make concessions thereto. This astonishing prescience is doubtless often due to the governor's appreciation of the fact that it could not fail to disturb the harmonious relations which it behooves him to cultivate and to maintain with the legislature, if he should seem to obtrude upon that body a senatorial candidate, backed by the influence and prestige arising from actual possession of the seat, whom he knew to be *persona non grata* to the legislature.

The autobiographical sketches in the Congressional Directory leave us in the dark on divers points in which the public persists in taking an interest. Of late years it has become very common, both in conversation and in the press, to refer to the Senate as the "Rich Men's Club," the "Paradise of Millionaires." Are these epithets justified? Is the choice of our legislatures tending more and more to fall upon candidates of great wealth? Has the Senate, therefore, become, or is it likely to become a coterie of rich men, from its very personnel disposed to represent "special interests," or the interests of a class, rather than those of the country at large? These are questions of no slight importance. But men are no more eager to disclose their incomes to the editor of the Congressional Directory than to the

tax assessor. While accurate data cannot be obtained, the basis for a reasonable judgment may be secured.

A dozen years ago, Charles Dudley Warner gave it as his opinion that, among the eighty-eight senators of 1892, there were but six millionaires; sixteen were men of wealth ranging from \$100,000 to \$700,000, while the rest were men of moderate means, many of whom might fairly be called poor.<sup>7</sup> From time to time, in popular handbooks, the attempt has been made to compile lists of men of great wealth throughout the country. An examination of two of these recent lists for the names of members of the Senate in the Fifty-eighth Congress, discloses the following results:

(1) In a list<sup>8</sup> attempting to enumerate all those whose wealth is estimated as at least \$300,000, occur the names of these twenty senators:

✓ Aldrich (R. I.)	Kean (N. J.)
✓ Alger (Mich.)	Lodge (Mass.)
✓ Ankeny (Wash.)	Millard (Neb.)
✓ Clark (Mont.)	✓ Newlands (Nev.)
✓ Depew (N. Y.)	✓ Platt (N. Y.)
Dietrich (Neb.)	✓ Proctor (Vt.)
✓ Dryden (N. J.)	✓ Smoot (Utah)
✓ Elkins (W. Va.)	✓ Stewart (Nev.)
✓ Fairbanks (Ind.)	✓ Warren (Wyo.)
✓ Hanna (Ohio)	Wetmore (R. I.)

It may be mere chance, or it may be a significant fact

<sup>7</sup> "The Attack on the Senate," in *Century*, Vol. 48, p. 374 (July, 1894).

<sup>8</sup> *The Financial Red Book of America*, published by the Financial Directory Association (N. Y., 1903).

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that from the States of New York, New Jersey, Rhode Island, Nebraska, and Nevada, *both* senators are found in this group. In another list,<sup>\*</sup> "American Millionaires," these senators are enumerated:

Aldrich (R. I.)	Kean (N. J.)
Alger (Mich.)	Kearns (Utah)
Ankeny (Wash.)	Lodge (Mass.)
Clark (Mont.)	Millard (Neb.)
Depew (N. Y.)	Proctor (Vt.)
Dryden (N. J.)	Scott (W. Va.)
Elkins (W. Va.)	Stewart (Nev.)
Fairbanks (Ind.)	Warren (Wyo.)
Hanna (Ohio)	Wetmore (R. I.)

This list includes the names of eighteen, or precisely 20 per cent. of the members of the Senate. Sixteen names are common to both lists.

Of course, for such data as these, no claim of great accuracy can be made, although the compilers of both lists declare that names have been given a place only after repeated revisions, and after the submitting of the names to expert opinion in the locality of which the men were resident. The fact that these classifications were made with no reference whatever to senatorial service entitles them to somewhat greater consideration. On the basis of these carefully made "guesses" the conclusion is probably warranted that about one in every five members of the Senate is the possessor of wealth running well into the hundreds of thousands of dollars. This fact may or may not have had anything to do with his election. The most casual reading of these

<sup>\*</sup>*World Almanac*, N. Y., 1902, pp. 135-146.

lists will note the names of men whose wealth is but the symbol and reward of their exceptional ability, men whose proved capacity for public service would have made them the probable selection of an intelligent legislature, had they been entirely dependent upon their salaries; side by side with these, appear the names of other men who never would have been thought of for senatorial honors but for their enormous wealth. The rich men of the first type include some senators whom the country could least afford to spare; nor is the presence in the Senate of those men whose election has been due solely or primarily to their great wealth an influence so corrupting to that body as is the presence of the few members whose names awaken no envious prejudice by appearing in lists of alleged millionaires, but who are making their public office a source of private gain—men who are in the Senate, not because they are, but because they hope to be, rich.

The most painstaking analysis of autobiographical data as to senators may, however, fail to reveal facts of great importance which are clearly to be seen by those under whose eyes the senators pursue their daily walk and conversation. Is it possible, then, to supplement the foregoing discussions as to the personnel of the Senate as affected in part, at least, by the process of its election, by a verdict upon the qualitative elements in the Senate?

The writer determined to attempt to secure such a verdict<sup>10</sup> from a small jury made up of men qualified

<sup>10</sup> A somewhat similar analysis of the elements of the Senate appeared several years ago in an article entitled: "The Senate in the Light of History," *Forum*, Vol. 16, p. 272.

by position and experience to form exceptionally well-grounded estimates of what the senators from the several States actually stand for in the Senate of the United States—of the qualifications, the achievements which have commended Senator A to his peculiar constituency, the state legislature, and have brought it about that he, rather than some other of a long list of senatorial possibilities, was chosen to represent his State upon the floor of the Senate.

It is not to be denied that widely divergent views may be held both as to the scientific character of such an inquiry and as to the significance of the results which it might yield. One of the most eminent of American statisticians, who was consulted in regard to the proposed inquiry, greeted it with a blast of disapproval. "Opinions! Opinions! I care not a snap of my finger for opinions! The scientist deals with *facts!*" Such was the gist of his criticism. A man of much influence in Washington replied to a request for counsel: "Touching the classification of senators, I fear to venture; angels dare not tread there and stay in this town. It would be mere matter of opinion, and opinion too much influenced by prejudice, personal, political, or both."

But in most of our political relations in this government by the people, we have to get along without access to the books of the recording angel! In casting our votes we have to rely upon the common opinion, the repute in which the several candidates are held by the community. The chances are that the men whose opinions have entered into the following verdict upon the Senate had far more thoroughgoing information

as a basis for their judgment than nine out of ten of the readers of these pages in choosing between the candidates for municipal office from their own home wards at the last election. Moreover, in political matters, opinions, whether right or wrong, are forces of high moment. At the present time, much of the agitation for change in the method of electing senators rests upon distrust of the product of the process now in use—upon the belief that in the make-up of the Senate men of statesmanship are few, while many men have secured their seats because of their money, or because of their sharp practice as politicians. The writer believes that the deliberate judgment passed upon senators by a few close observers—based though it must be upon opinion, and not upon absolute knowledge—constitutes, nevertheless, a *fact* as interestingly significant, as well worth ascertaining and as important in its bearings upon American political development of the near future as are many of the facts which lend themselves more readily to the statistician's tabulation.

If objection is still raised to the significance of such a verdict on the ground that it rests merely upon opinion which is liable to prejudice, political or personal, or both, it is to be remembered that this verdict represents not the individual opinion, but the concurrent opinion of at least three of the five jurors. Personal prejudices and idiosyncrasies of judgment for the most part were dissipated upon the senators who remained unclassified; the final verdict from so representative and conservative a body stands for a consensus of opinion which may be found well worthy of consideration.

## WHAT SENATORS REPRESENT.

A CLASSIFICATION OF SENATORS IN THE FIFTY-EIGHTH CONGRESS.<sup>11</sup>I. *Statesmanship.*

Men who combine high public spirit with capacity for leadership—men whose service shows inde-

<sup>11</sup> It is obvious that the names of the men who are responsible for this classification cannot be made public. The full list is known neither to the publisher of this volume nor to any member of the jury, no one of whom has ever raised the question as to the identity of the men with whom he was collaborating. The writer is deeply sensible of their confidence, not less than of their coöperation. In assuming to vouch for the qualifications of the jury, the writer would say that he sought the opinions only of men of high standing, who speak with authority in their several callings. The reader is entitled to some further knowledge as to these men's special fitness, training or opportunity for their delicate and difficult task.

Each of the five men has spent many years in Washington, and was not only resident there throughout the term of the 58th Congress, but was in a position which necessitated close observation of the personnel of the Senate. One was in high administrative office under the federal government. A second was a member of the House of Representatives, and in that particular Congress was brought into exceptionally close touch with senators from all over the country. A third was an expert investigator who has been sent abroad in the service of one or more of the executive departments, and who is a regular contributor of leading articles upon American politics to American and foreign periodicals. The other two were Washington correspondents of many years' experience, whose work is one of the chief influences in forming public opinion throughout widely separated sections of the country. Two of the five were New England born and bred; one is a Pennsylvanian, one a Southerner and one is not of American birth. At the time they were asked to help in this matter, except in the case of the Congressman, the writer had no intimation as to their political affiliations, nor did he know their attitude upon the question of the popular election of senators. He has learned since the verdict was rendered that three out of the five list themselves as Republicans and

pendence of thought, courage and some outlook beyond mere partisan advantage—men who most nearly uphold the “best traditions of the Senate”:

✓Allison,	✓ Daniel,	Lodge,
Bacon,	Fairbanks,	Morgan,
✓ Bailey,	Foraker,	Platt, O. H.,
✓ Beveridge,	Frye,	Spooner,
✓ Cockrell,	Hale,	Teller.
✓ Culberson,	Hoar,	

—17.

Average service, 16.9 years.

one as a Democrat; the fifth, who is not an American, declares that he “has no politics.” Three are gravely doubtful whether popular election of the Senate would be of advantage, while two are heartily in favor of the change.

To each of the five jurors were sent descriptive classification heads, under which they were requested to classify the members of the Senate of the first session of the 58th Congress. The senators of that particular group were chosen that the list might include the members of the last Congress which has completed its record, and that it might include as few senators as possible who had been appointed to fill vacancies.

The writer's task has been merely the collating of the lists made out by the individual jurors; in no respect whatever has his personal opinion colored the verdict. That the jurors have found their task not an easy one, and that they have worked at it with a conscientious determination to make their estimates of the senators as justly discriminating as possible, is evident from the suggestions and comments which have come from each member of the panel.

These comments may serve to illustrate the spirit in which the verdicts have been rendered:

a. “There is ——; a man of great leadership, of tremendous capacity and broad vision, and yet, in so many respects, so typically the politician and the representative of corporate wealth, that clearly he cannot be placed in Class I. Yet in that Class I include —— for the reason that, although —— came to the Senate as a politician, since then he has broadened and grown with the measure of his responsibility; he has shown

II. *Men of the Rank and File.*

Men of fair ability, but of no proved capacity for leadership—men who do the best they can, according to their lights, and thus fairly represent the average American citizen, the stuff of which majorities are made:

Bard,	Dubois,	McCumber,
Carmack,	Gamble,	Nelson,
Clapp,	Hansbrough,	Patterson,
Clay,	Heyburn,	Perkins. —12.

Average service, 6.9 years.

Men whom three votes placed either in *I.* or *II.*:

Burnham,	Dolliver,	Pettus,
Clark (Wyo.),	Gallinger,	Proctor,
Cullom,	Long,	Quarles.
Dillingham,	McComas,	—11.

Average service, 8.7 years.

capacity for leadership, independence and courage. — is a man of wealth, which would place him in Class III., and he is also affiliated with corporate interests, but he is not their tool and attorney on the floor of the Senate, as are some other senators."

*b.* After his lists had been sent in, there came a hasty note from one of the members of the jury, saying: "I would like to change my designation of Senator — from Class III. B. (Representatives of Corporate Wealth) to Class I. (Statesmen). These things are all relative, all comparative, and he does not seem to me—on longer reflection—to belong to the same class with the other men whom I have put into that group. He is on the border line between the two classifications; but I prefer to give him the better one."

*c.* "One of the most difficult men to classify, under your schedule, is —. Nominally he stands for the 'best thought of the Senate,' but he is the author of no constructive legislation; he has not shown capacity for leadership; he is

III. *Wealth.**A. Rich Men.*

Perhaps not "merely rich men," but men who give color to the charge that the Senate is becoming a "Millionaires' Club." Men whose presence in the Senate finds its chief, if not its sole explanation in their great wealth:

Alger,	Dryden,	Newlands,
Ankeny,	Kean,	Wetmore.
Clark, W. A.,	Kearns,	—8.

Average service, 4.4 years.

*B. Representatives of Corporate Wealth.*

Men, whether of great wealth or not, whose presence in the Senate is due chiefly to the fact that they are senators highly acceptable to great corporate interests. Men whose past career has proved them effective servants of corporate wealth, or who have given evidence that they may be relied upon for such service in the future, in the Senate:

Depew,	Martin,
Elkins,	Stewart.

—4.

Average service, 11 years.

Others falling within III., A or B:

Scott,	Warren.
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—2.

Average service, 8 years.

narrowly partisan; he is a spoilsman, although preaching civil service reform, and he controls a finely organized machine. Yet he is not the politician of the — or — type. Still he must stand with that unholy crew, which does not quite properly classify him."

IV. *Political Manipulation.*

Men who are in the Senate because they are past-masters of the arts of the politician, to whom politics is a game which they play with the highest skill, but with little concern for the interests of the public as compared with their own interests and those of their clan :

Blackburn,	McCreary,	Quay,
Burrows,	Mitchell,	Stone.
Dietrich,	Penrose,	
Gorman,	Platt, T. C.,	—10.

Average service, 10.6 years.

Men whom three votes placed either in *III.* or *IV.* :

Aldrich,	Hanna,	Kittredge,
Foster (La.),	Hopkins,	McEnergy. —6.

Average service, 8.2 years.

V. *Accident.*

Men upon whom, under normal conditions, the choice would never have fallen, but who have been swept into the Senate by some wave of discontent in their several States, or as compromise candidates to break a stubborn deadlock in the legislature :

Allee,	Ball,	—2.
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Average service, 2 years.

VI. *Past Services.*

Men who have been elected to the Senate or are continued in the Senate for their present term, not from any anticipation of high service in

the present or future, but because of grateful remembrance of services rendered in the past:

Bate,      Berry,      Hawley.      —3.

Average service, 20.7 years.

VII. *Unclassified.*

Men who have as yet made so little impression as to afford slight basis for placing them, and men upon whose classification there was no agreement:

Burton,	Millard,
Clarke (Ark.),	Money,
Foster (Wash.),	Overman,
Fulton,	Simmons,
Gibson,	Smoot,
Latimer,	Taliaferro,
Mallory,	Tillman.
McLaurin,	

—15.

Average service, 4.5 years.

Someone has referred to the Senate as the "high school of statecraft." These classifications evidence a conservative hesitance to assign either a very high or very low grade to the pupils who had not been in attendance upon this school long enough to prove clearly their character and ability. Most of the men in regard to whom there was no consensus of opinion are freshmen in that high school, for only three of them had entered upon their second terms, and but one had served a period of ten years. Their average service was only four and one-half years, while that of the

"men of the rank and file," and of those on the border line between Classes I. and II., ranged from seven to nine years. In comparison with most of the great careers in the Senate, these periods are short, and they indicate that, in the opinion of the jurors, many of these men were still in the school on probation, as it were, and had not yet clearly revealed what they might come to represent.

On the other hand, the average service of the men listed as statesmen was over seventeen years; in fact, but one man was admitted to this class who had not completed his first term in the Senate, and he had proved his powers of leadership in successive terms as a member of the House. Nor have the jury agreed in listing as representatives of corporate wealth or as machine politicians men who have not had abundant time and opportunity in the Senate to win for themselves a far more creditable standing; the average service in each of these groups was practically the same—eleven years.

The significance of the foregoing analysis is to be found not merely in the personnel of the various groups, nor in the distribution of their members among the several States, but also in the proportion which the several groups bear to each other. Thus, the senators about whom there was no consensus of opinion constitute one in six of the total membership of the Senate. Four out of every nine senators are listed either among the statesmen or among the men of the rank and file. These are classes, enrollment in which implies, if not high powers of leadership, at least the qualities of courage, intelligence and integrity, which make "the man behind the gun" quite as essential to the winning of battles as is

the man who plans the campaign. On the other hand, in the opinion of these close observers, one senator out of every three owes his election to his personal wealth, to his being the candidate satisfactory to what is coming to be called the "System," or to his expertness in political manipulation—qualifications which make their usefulness as members of the dominant branch of Congress decidedly open to question.

## CHAPTER V

### THE MOVEMENT FOR THE ELECTION OF SENATORS BY THE PEOPLE

#### A. THE GROWTH OF THE MOVEMENT FOR AN AMENDMENT.<sup>1</sup>

THE tardy rise of the demand that senators be elected by popular vote is hardly less remarkable than the rapid growth which that demand has attained in the few years since it really began to attract public notice. Already, in the Convention of 1787, James Wilson had spoken in no doubtful tone as the herald of a democracy which was to seek primarily to be a government by the people. Yet urgent demand for the popular election of senators has been confined to the past generation.

The first decades of the nineteenth century witnessed a thoroughgoing democratization of the state constitutions:—terms of office were shortened; property qualifications, both for office and for the suffrage, were removed; offices formerly appointive, particularly in the judiciary, were made elective; while governors and other officials, before chosen by the legislatures, came to be elected by the direct votes of the people. It

<sup>1</sup> The extent to which, without change of the fundamental law of the land, popular control of senatorial elections has been attempted and may be secured is discussed in the next chapter.

was inevitable that a movement of such sweep should pass the bounds of the state system, and make itself felt as well upon the national government, where few more obvious points of attack presented themselves than the election of the senators by state legislatures.

Yet up to the early seventies the agitation for this change was sporadic and desultory. As a proof, in all these eighty years there had been introduced in Congress only nine resolutions favoring the election of senators by the direct vote of the people.<sup>2</sup> The example was set by Mr. Storrs of New York. On the 14th of February, 1826, in the House of Representatives he offered a resolution declaring it expedient that the Constitution of the United States be so amended that senators be not appointed by legislatures, but chosen by the electors in each State having the qualifications requisite for electors of the more numerous branch of the state legislature. The mover seems to have had no special enthusiasm for his own measure, for he declared that his own opinion of its expediency must depend upon the opinion which the House should express on the other amendments which were then pending. At his request, accordingly, it was laid upon the table; and there it remained. Three years later, on February 19, 1829, Mr. Wright of Ohio proposed an elaborate amendment, the fourth clause of which provided that the Senate should be composed of two senators from each State, to be chosen for four years in such manner as the legislature might prescribe. This option, as to the method of choice, anticipated by more than sixty

<sup>2</sup> H. V. Ames, *The Proposed Amendments to the Constitution of the United States during the First Century of Its History* (pp. 24, 60-63).

years a proposition which met with not a little favor in a later House,<sup>3</sup> but, at this time, it did not come to a debate. In 1835, a resolution similar to that of Mr. Storrs, nine years earlier, met with the same fate. Between 1850 and 1855, five such resolutions were introduced, but none ever emerged from committee.

No man was more pertinacious in proposing the change in question than Andrew Johnson of Tennessee. Two of the resolutions already mentioned were introduced by him while a member of the House of Representatives. Again, in 1860, as a senator, he renewed the agitation. In 1868, he sent a special message to Congress advocating the measure; and in his annual message of the same year repeated the recommendation. With Johnson, this amendment was part of a scheme of Democratic change; for he usually put it forward with a proposal for the direct election of President and vice-president by the people, and for a 12-year term for members of the federal judiciary. His messages<sup>4</sup> speak of the objections to the election of senators by legislatures as so palpable as to make their enumeration unnecessary; and he declared that the choice of senators directly by the people would be more consistent with the genius of our government. But, in the years from 1860 to 1870, there were more momentous issues; and even if President Johnson's advocacy had been calculated to commend the measure to the favorable attention of Congress, little room was left for consideration of such a change in the Constitution.

<sup>3</sup> *Infra*, p. 117.

<sup>4</sup> July 18, 1868; December 9, 1868.

In the seventies, however, a marked increase in the number of the resolutions began. Six were presented in the Forty-ninth Congress, and the same number in the Fiftieth. In the first session of the Fifty-first Congress, nine proposals of such an amendment were offered, and petitions and memorials in its favor came in from all over the country. In the Fifty-second Congress, three similar amendments were proposed in the Senate by those indefatigable advocates of the movement, Senators Palmer of Illinois, Turpie of Indiana and Mitchell of Oregon. In the House, seventeen similar amendments were introduced by as many different representatives from as many different States, and, from that time to the present not a Congress has passed which has not been beset by new petitions and memorials urging that an amendment with this object be submitted to the States. The bare statistics of these proceedings would be without interest. It will suffice to point out a few phases of the movement.

In Congress from the first, for reasons which will readily suggest themselves, the agitation in favor of the proposed change has been primarily in the House—not in the Senate. Scores of memorials and petitions urging such an amendment had been referred to the committee on election of President, vice-president and representatives in Congress, and there had met their quietus. But, finally, in 1892, in the first session of the Fifty-first Congress, that committee reported favorably a joint resolution for the submission of the desired amendment to the States.

Five times such a resolution has been reported and

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brought to a vote in the House, and in every case the result has been overwhelmingly in its favor.

### HOUSE VOTES UPON SUBMISSION OF AMENDMENT FOR POPULAR ELECTIONS.

Congress.	Date.	Aye.	No.
52d.	Jan. 16, 1893.	Two-thirds.	..
53d.	July 21, 1894.	141	51
55th.	May 11, 1898.	185	11
56th.	April 13, 1900.	240	15
57th.	Feb. 13, 1902.	Two-thirds.	..

In the first and last instances, the yeas and nays were not called for, and the record is simply to the effect that two-thirds having voted in its favor, the resolution was passed. In the three cases where the vote is recorded, as will be noted, the majority in favor of the amendment has constantly and rapidly increased.<sup>5</sup>

In the Senate the record has been much the same. Petitions for an amendment providing for popular elections for senators were for many years referred to the committee on privileges and elections before it saw fit to report upon them. In the Fifty-second and Fifty-third Congresses, minority reports were submitted favoring the amendment; and in the Fifty-fourth Congress (June 5, 1896), the committee reported a joint resolution, and strongly urged its adoption by the Senate. The first speech in the Senate specifically devoted to advocating a measure of this kind was made in 1887 by Senator Van Wyck of Nebraska. Its occasion may perhaps be discovered in the fact that he had just suffered defeat at the hands of the Legislature for reelection to the Senate, after having polled a majority of nearly 10 to

<sup>5</sup> *Infra*, pp. 112, 256-258.

1—46,110 out of 50,448—of the popular vote in an election authorized by the novel provision of the Nebraska Constitution of 1875.<sup>6</sup> Such an amendment has also been ardently advocated, as has been said, in season and out of season, by Senators Mitchell, Palmer and Turpie; but never yet has it proved possible to bring the Senate to a vote upon the main question.

Meanwhile, the rising sentiment in favor of this constitutional amendment has manifested itself in many ways the country over; and with ever-increasing force has pressure been brought to bear upon Congress to submit it to the States. Individual citizens have urged it. Scores of farmers' associations, "granges," and other local organizations, particularly in the Western States, have sent in their petitions for it. In state elections it has become a favorite "plank," particularly in the platforms of the Democratic and Populist parties.<sup>7</sup> Finally, the national parties have taken it up. It has appeared in the platform of the People's Party at every election, beginning with 1892; and in the platform of the Democratic Party it found a place in 1900, and again in 1904.

DEMAND FOR POPULAR ELECTION OF SENATORS IN  
NATIONAL PARTY PLATFORMS.

1892. People's Party.

1896. People's Party.

National Party. (Seceders from Prohibition Party.)

<sup>6</sup> Art. 16, Sec. 312, *infra*, p. 141.

<sup>7</sup> As early as 1892 this measure was approved in five Democratic and two Republican State platforms. In Oregon both parties demanded it.

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1896. Social Labor Party.<sup>8</sup>  
1900. Democratic Party.  
People's Party. (Fusionists.)  
People's Party. ("Middle-of-the-Road.")  
United Christian Party.  
Silver Republican Party.  
1904. Democratic Party.  
People's Party.<sup>9</sup>  
Prohibition Party.

But the Constitution of the United States is not to be amended by the easy process of signing petitions or indorsing resolutions in party conventions. It must always wait upon the action of Congress and of the States. But which shall take the initiative? As early as 1874, the legislatures of both California and Iowa set the example of addressing Congress in favor of an amendment providing for the election of senators by the people. Since 1890, this action has been widely imitated. Before memorializing Congress upon the subject, the legislatures of three States have provided for a formal test of the sentiment of the voters of their States by a referendum at a general election, with results as follows:

### REFERENDA ON POPULAR ELECTION OF SENATORS.

State.	Year.	For.	Against.
California.	1892.	187,958	13,342
Nevada. <sup>10</sup>	1893.	6,775	866
Illinois.	1902.	451,319	76,975

The accompanying table shows the action taken by the several State legislatures in indorsing the demand for this amendment.

<sup>8</sup> Demands "the abolition of the United States Senate and of all upper legislative chambers."

<sup>9</sup> Demands "the direct vote for all public officers."

<sup>10</sup> The preamble of the Nevada Act authorizing the referendum

### TABLE I.

Action Taken by State Legislatures in Favor of an Amendment providing for the Election of United States Senators by the Direct Vote of the People.

The significance of this Table lies in the following points:

- (a) The geographical distribution of the demand for this amendment. The North Atlantic States are here in sharp contrast with the others.
- (b) The recurrent waves of demand for the amendment, culminating in 1893 and in 1901. These periods of many resolutions will be found to bear a close relation to periods when deadlocked elections, or vacancies, or senatorial scandals have been much in the public mind.
- (c) The changed form in which the States address Congress. Since Pennsylvania started the movement in 1899, with great unanimity the States have turned from the old to the untried method of initiating constitutional amendments; instead of requesting Congress to submit the amendment, they have applied to Congress to call a convention for the purpose of proposing this amendment. *Infra*, pp. 122-124. The State legislatures' resolutions explicitly state that this form has been adopted because of the obstructionist attitude taken by the Senate in five times refusing to act upon the resolutions proposing this amendment, which have been passed by the House. *Supra*, p. 104.
- (d) It will be seen that within the last fifteen years, in one form or another, approval of direct election of senators by the people has been signified to Congress by the legislatures of thirty-one of the States—more than two-thirds required by the Constitution for the initiation of an amendment to the Constitution. *Infra*, p. 114.

### ABBREVIATIONS.

*P. A.*—Joint resolution requesting Congress to *propose* such an amendment.

*S. A.*—Joint resolution requesting Congress to *submit* such an amendment.

*Ref.*—An act providing for a *referendum*, at the next general State election, on the question, whether senators should be elected by direct vote of the people.

*Conf.*—Joint resolution providing for *conference* with other States to secure their co-operation in furthering such an amendment.

*C. C.*—Joint resolution asking Congress to *call a convention* to propose such an amendment.

TABLE I.

STATES	1800	1801	1802	1803	1804	1805	1806	1807	1808	1809	1800	1801	1802	1803	1804	1805
<b>NORTH ATLANTIC</b>																
Maine																
New Hampshire																
Vermont																
Massachusetts																
Rhode Island																
Connecticut																
New York																
Pennsylvania																
New Jersey																
Delaware																
Maryland																
<b>NORTH CENTRAL</b>	<b>1800</b>	<b>1801</b>	<b>1802</b>	<b>1803</b>	<b>1804</b>	<b>1805</b>	<b>1806</b>	<b>1807</b>	<b>1808</b>	<b>1809</b>	<b>1800</b>	<b>1801</b>	<b>1802</b>	<b>1803</b>	<b>1804</b>	<b>1805</b>
Ohio	S.A.	P.A.					P.A.									
Indiana	P.A.															
Illinois	S.A.															
Michigan	P.A.						P.A.									
Wisconsin	P.A.						P.A.									
Minnesota								S.A.								
Iowa								S.A.								
Missouri									C.C.							
Kansas									S.A.							
Nebraska									C.C.							

SOUTHERN		1890	1891	1892	1893	1894	1895	1896	1897	1898	1899	1900	1901	1902	1903	1904	1905
Virginia																	
West Virginia																	
North Carolina																	
South Carolina																	
Georgia																	
Florida																	
Alabama																	
Mississippi																	
Louisiana																	
Arkansas																	
Texas																	
Tennessee																	
Kentucky																	
WESTERN		1890	1891	1892	1893	1894	1895	1896	1897	1898	1899	1900	1901	1902	1903	1904	1905
California	REF.																
Oregon	S.A.																
Nevada		S.A.															
Colorado			REF.														
North Dakota				P.A.													
South Dakota					P.A.												
Montana						S.A.											
Washington							P.A.										
Idaho								P.A.									
Wyoming									P.A.								
Utah										P.A.							

At a glance it will be seen that the demand is widespread, and yet, to some extent, localized. In the North Atlantic States, the only one whose legislature has indorsed the movement is Pennsylvania; but it is to be added that the action taken by Pennsylvania in 1899 gave both a new impetus and a new direction to the propaganda.<sup>11</sup> Among the Southern States, on the other hand, only four have not yet called upon Congress to act in the matter; and of the North Central States, and the Western States, every legislature has at least once sent its memorial or petition to Congress; and several have importuned every Congress for the last eight or ten years.

In short, thirty-one state legislatures have already signified to Congress their urgent desire that steps be taken to initiate this amendment. Nor is this an ade-

read as follows: "Whereas it is expedient that the wishes of the people of this State upon the subject of the election of United States Senators should be unmistakably expressed, . . ." it was provided that a memorial of the vote be sent to the President, Vice President, members of Congress and to the Governor of each State.

In Illinois the vote was taken under the provisions of an Act passed the previous year, "providing for an expression by electors on questions of public policy at any general or special election," and was submitted in the following form:

<b>PROPOSED QUESTION OF PUBLIC POLICY.</b> Shall the next General Assembly take the necessary steps, under Article 5 of the Constitution of the United States, to bring about the election of United States Senators by the direct vote of the people?	<b>YES.</b> <hr/> <b>NO.</b>
---	---------------------------------

<sup>11</sup> *Infra*, p. 122.

quate gauge of the sentiment in favor of popular election of senators. In not a few of the States which have not petitioned Congress, the reason is, not that the object of the amendment is disapproved, but that, as in such States as Alabama and Mississippi, the nomination and even the election of senators have already in large measure been subjected to popular control.<sup>12</sup> Often, too, these resolutions are doubtless crowded out by more pressing business. Thus, in 1901, the Tennessee House, and, in 1903, the Minnesota Senate, passed such resolutions unanimously. As the legislatures of both States had, in previous years, indorsed such action, it is probable that the concurrence of the other House was not secured in these particular years simply because it was not deemed essential to push through a measure which only reiterated former action. Moreover, even in such conservative States as Massachusetts, the agitation is not without vigor. Hardly a year passes when a joint resolution upon this subject is not voted upon, and in 1900 a resolution declaring that it was desirable that United States senators be elected by popular vote was passed by the House by a vote of 81 to 54, but was rejected by the Senate, 9 to 23. Even in Delaware, in the midst of the deadlock<sup>13</sup>—broken by the compromise between the regular Republicans and the Addicks followers—the House voted unanimously in favor of a resolution urging Congress to call a convention for the purpose of amending the Constitution in this regard. But in the Senate the resolution was lost by a vote of 6 to 11.

<sup>12</sup> *Infra*, p. 140.

<sup>13</sup> February 25, 1903.

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The sentiment in favor of amending the Constitution so as to provide for the election of senators by the people has, therefore, now been tested by the five votes in the House of Representatives; by the referenda in the three States where the question has been brought to a direct popular vote; and, finally, by the action taken by the state legislatures. It may be of interest to supplement this presentation of the legislatures' action by a table showing the last recorded vote upon the subject in the House of Representatives, analyzed by States. It will be seen that opposition or even indifference reveals itself here neither in the same proportions, nor with the same clean-cut geographical distribution as in Table I.

TABLE II.

Vote in House of Representatives, April 13, 1900, on a Resolution Proposing an Amendment Providing for the Election of Senators by Direct Vote of the People:

State.	Yea.	Nay.	"Present."	Not Voting.	Unaccounted For.
North Atlantic—					
Maine .....	..	3	..	1	..
New Hampshire..	2	..	..	..	..
Vermont .....	2	..	..	..	..
Massachusetts ....	7	..	1	5	..
Rhode Island.....	2	..	..	..	..
Connecticut .....	..	3	1	..	..
New York.....	18	..	..	15	1
Pennsylvania .....	20	..	1	8	1
New Jersey.....	4	1	..	3	..
Delaware .....	1	..	..	..	..
Maryland .....	4	..	..	2	..
North Central—					
Ohio .....	16	..	..	5	..
Indiana .....	10	..	..	3	..
Illinois .....	15	1	..	6	..
Michigan .....	11	1	..	..	..

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State.	Yea.	Nay.	"Present."	Not Voting.	Unaccounted For.
Wisconsin .....	3	..	..	7	..
Minnesota .....	6	..	..	1	..
Iowa .....	5	4	..	1	1
Missouri .....	12	..	..	3	..
Kansas .....	7	1	..	..	..
Nebraska .....	5	..	..	1	..
<b>Southern—</b>					
Virginia .....	7	..	..	2	..
West Virginia....	3	..	..	1	..
North Carolina...	8	..	..	1	..
South Carolina...	7	..	..	..	..
Georgia .....	10	1	..	..	..
Florida .....	1	..	..	1	..
Alabama .....	6	..	..	3	1
Mississippi .....	4	..	..	3	..
Louisiana .....	1	..	..	5	..
Arkansas .....	5	..	..	1	..
Texas .....	10	..	..	3	..
Tennessee .....	8	..	1	..	..
Kentucky .....	10	..	..	1	..
<b>Western—</b>					
California .....	4	..	..	3	..
Oregon .....	1	..	..	1	..
Nevada .....	1	..	..	..	..
Colorado .....	2	..	..	..	..
North Dakota....	1	..	..	..	..
South Dakota....	2	..	..	..	..
Montana .....	..	..	..	1	..
Washington ....	2	..	..	..	..
Idaho .....	..	..	..	1	..
Wyoming .....	1	..	..	..	..
<hr/>	<hr/>	<hr/>	<hr/>	<hr/>	<hr/>
<b>Total .....</b>	<b>244</b>	<b>15</b>	<b>4</b>	<b>88</b>	<b>4</b>

Thus, of the North Atlantic States, Pennsylvania is the only one whose legislature has memorialized Congress in favor of this measure; yet, in Congress, the delegations of only two of those eleven States actually

voted against the resolution. In another respect, the contrast between the two expressions of public sentiment is yet more striking. Taking the votes of the representatives from the fifteen States whose legislatures have not yet urged this change, this surprising result presents itself: In five of these state delegations, the vote was unanimously in favor of the resolution; in seven more, every vote cast was in its favor; only in three was a negative vote recorded, and in one of those, New Jersey, the single vote in opposition was far outweighed by those of the other members from that State. But, in the Maine and Connecticut delegations, not a single vote was cast in its favor. In the case of the former, this result may represent the individual judgment of several congressmen well known for their independence of thought and action. In the Connecticut delegation, on the other hand, there can be little doubt, this surprising unanimity<sup>14</sup> is an outgrowth of Connecticut's antique system of representation, by virtue of which the hill-towns' dominance in the legislature insures the election of Republican senators—a result which would often be placed in doubt if the election were made by the direct vote of the people.<sup>15</sup>

Upon this issue, then, in which way is the sense of the people best represented, by the action taken (or refused) by state legislatures in their address to Congress, or by the votes of the members of Congress directly upon the resolution for submitting the amend-

<sup>14</sup> In the vote of 1898, all four Connecticut congressmen voted 'No'; in 1900, one evaded the question to the extent of answering 'Present.'

<sup>15</sup> *Supra*, p. 65.

ment to the States?<sup>15a</sup> By the one, thirty-one States are recorded in its favor, while fourteen are neutral, or in opposition. By the other, with but two exceptions, every State in the Union has given it emphatic indorsement.<sup>16</sup>

#### B. THE FORM OF AMENDMENT.

The progress of this movement for popular elections of senators has been accompanied by certain significant changes in the proposed form of constitutional amendment; and by modifications in the methods advocated both for its initiative and ratification—due, in part, to changes in public opinion, and, in part, to unexpected obstacles which the movement has encountered. The earlier propositions for amendments coupled the election of senators with that of the President and vice-president. It would seem, therefore, that the first demand arose not from experience of any abuses, but simply as a matter of democratic theory. Most of the state governments had been thoroughly democratized, so that they seemed to spring directly from the people. But, in the federal system, there yet remained offices beyond their immediate touch. Was it not a grave inconsistency that these were not brought within reach? Was it not an affront to the intelligence of the people that they were not intrusted with all power? It was such considerations as these which appealed to the radicals of the middle of the century.

During the past ten years, however, the agitation has been pretty generally narrowed down to the de-

<sup>15a</sup> For a discussion of the extent to which these votes really represent a "popular demand," *infra*, pp. 256-258.

<sup>16</sup> For the recent action of the Iowa legislature, see p. 129.

mand for the popular election of senators. To what causes this change should be attributed is not clear—whether to the rise of a belief that popular elections of other federal officers are, at present, unattainable, or undesirable; or to a feeling that democratic progress can best be achieved one step at a time, and that the securing of popular election of senators is the shortest, or the one easiest to take; or to a conviction that the growing prevalence of abuses in senatorial elections has made a change in their method imperative. At any rate, the amendments which have been favorably voted upon by the House of Representatives, have, with little variation in form, provided that United States senators shall be elected in each State by the electors thereof; that a plurality shall elect; and that, in the case of a vacancy, temporary appointments may be made by the governor in accordance with the statutes or constitution of that State.<sup>16a</sup> At times, this resolution has been antagonized by disingenuous amendments or substitute measures. For example, Senator Depew blocked all chance of the pending measure's passing the Senate by attaching to it an amendment that the qualifications of citizens entitled to vote for United States senators and representatives should be uniform in all the States, and providing for unrestricted federal control of such elections.<sup>17</sup> At another time, Senator Penrose introduced, as a counter-irritant, a bill providing that States be represented in the Senate approximately in proportion to population, each State having at least two. If the purely obstructionist nature of each of these propositions were not evident at a glance, it would be sug-

<sup>16a</sup> *Infra*, Appendix I., p. 271.

<sup>17</sup> *Infra*, p. 250.

gested by the fact that neither takes account of being flatly in the face of other clauses of the Constitution than the one in amendment of which it was urged.

The only important variation from the ordinary form of the amendment is one that has been repeatedly brought forward in the House of Representatives. It first made its appearance there seventy-five years ago, but it passed out of mind and was not heard of again in Congress until introduced in the early nineties by Mr. Bryan. In 1892, it was urged in a minority report from the committee on election of President, Vice-President and Representatives in Congress; in 1898, it was incorporated in the report of the committee. This is the provision for the so-called option. In its simplest form it proposes that the present clauses of the Constitution relative to the election of senators remain unchanged, and that there be added the following: Provided, That such senators may be elected by a direct vote of all the electors of any State qualified to vote for members of the most numerous branch of the state legislature, whenever such State shall, by law, so provide.<sup>18</sup>

<sup>18</sup> The theoretical ground advanced in favor of this option is that it is more considerate of the States. Instead of prescribing in dictatorial fashion the method in which the States shall elect their senators, it opens to them an opportunity, if they prefer popular elections. It savors, thus, less of centralization and the suppression of State initiative. The principal arguments used in its favor in Congress, however, were not those of principle, but of expediency. In the first place, it was urged, it would secure the advantage of reserving to individual States the power to experiment, and thus to test for themselves and for observant sister States the working of popular election in comparison with the present system. Thus, it would not be necessary to abandon the familiar form of election and at once become bound hard and fast to a new method, the results of which might

At its last appearance this proposed option, though recommended by the committee, was defeated <sup>19</sup> by the decisive vote of 185 to 11. There can be no doubt that, prove unsatisfactory. In the second place—and this was what chiefly recommended it to the friends of the measure—the option would serve as a buffer against federal control of elections. The Republican party still stood by its advocacy of federal control and insisted that it would be inevitable as regarded senatorial elections, if they were to be put into the hands of the people. To the Democrats such control was so obnoxious that, if it were to be imposed, many would lose all enthusiasm for the election of senators by the people. Federal control has never been asserted over the elections in state legislatures. The States, therefore, to whom central control was most repugnant, could avoid it by retaining legislative elections.

Moreover, if popular elections of senators were to obtain in only a part of the States, it was hoped that the ardor of Republicans in Congress for federal control might be so far diminished that it would not be asserted. But, if a new and more sweeping Force Bill should at any time be threatened, after popular elections had become prevalent under the proposed amendment, then the opportunity would still be open to avoid federal restraint, for the legislature of the individual State could regain its independence in its senatorial elections by restoring them again to the hands of its legislature. It was claimed, also, that by reducing the probability of a controversy over federal control, it would remove partisanship from the discussion of the measure, and make it far easier to secure the assent of Congress, inasmuch as members would vote for it more readily if the proposition of popular elections stood by itself, not as a thing to be thrust upon the States, but as an opportunity which they might accept or not, as they pleased. Finally, it was urged that the ratification by the States would be much more easily secured, first, because the measure, freed from partisanship, would not be opposed in the State legislatures by the boss and by corporate interests, and, secondly, because even the legislators of a State in which the

if the direct election of senators by the people is to come through an amendment of the Constitution, the law will be so framed as to make the new method bind-

old form of election was sure to be retained would, in courtesy to the sister States, not vote against an amendment which was simply permissive, and which other States might highly prize. But this point provoked from an opponent the comment: "That any legislature, opposed to clothing the people with power to elect senators by their own direct vote, will ratify a constitutional amendment merely to please the people of some distant State, is beyond the range of argument and barely within the misty realm of credulity, childlike and bland." Mr. De Armond in *Congressional Record*, Vol. 23, p. 6078 (July 12, 1892).

This option, however, was earnestly opposed by many who were heartily in favor of popular elections of senators. They held that uniformity was desirable, and that if election of senators by the people was a good thing, it ought to be secured throughout the country—indeed, if the option were allowed, it would be probable that those States, in which popular elections would be of most advantage in correcting existing abuses, would be the very States which would cling to election by the legislatures, with the result that the chief gain hoped for from the amendment would fail to be realized. Republican members took the ground, also, that the national government should be self-dependent in the constituting of its various departments, which is but another way of asserting the right of federal control over elections. Thomas B. Reed, in particular, made protest against the option as "a most offensive proposition to take away from the United States its right of control which it has by the Constitution as to its own legislative body." But the most serious objection was that the possibility of change of method would prove a constant temptation to shift from one to the other for partisan advantage. The method of choosing presidential electors is left by the Constitution to be determined by the legislatures. It has come everywhere to be by direct vote of the people, but there still remains the question whether that vote shall be taken by districts or by a general ticket. In Michigan in 1888 the vote was taken on general ticket, but in 1891 the legislature provided that it should be

ing upon all the States, and uniform throughout the Union.

#### C. HOW SHALL THE AMENDMENT BE INITIATED?

The Constitution specifies two methods by which amendments may be initiated, and two, also, by which they may be ratified. Hitherto, all amendments have been proposed by Congress, and by them referred to the legislatures of the several States for ratification. Following this familiar precedent, all the earlier attempts to secure the popular election of senators, whether by the petitions of individuals, the memorials of associations, or the joint-resolutions of legislatures, were in the form of requests to Congress to propose and submit to the States for ratification an amendment providing for the election of senators by the direct vote of the people. But, before long, it became evident that the senators regarded with chilling indifference this question of submitting to the States a proposal of modification in the process by which they had found taken by districts, rightly estimating, as the event proved, that the dominant party would gain thereby. To the legislature of 1893, however, the results anticipated from another trial of district voting were unsatisfactory, so it improved the opportunity to shift back to election by general ticket. In precisely the same fashion, it was insisted, if this option were left in the hands of the state legislatures, it would tempt partisanship in the legislatures to repeal a law committing the election of senators to the people whenever a senatorial seat could be secured by recurring to the old method of election by the legislature. It would make this question the football of politics; and the bribery and corruption, which the amendment aims to prevent, might be brought back in efforts to persuade the legislature of a given year to modify the law to suit the corruptionist's interests.

their way to the Senate. The House might pass such a resolution by an overwhelming vote, or even unanimously, but it found its quietus none the less in the Senate committee on privileges and elections. This opposition on the part of the Senate is apparently not to be overcome until the Senate is either converted, by the process of filling it with members whose nomination has been by conventions or by the people, or, seeing that its resistance will be futile if it persists, yields in order to avoid the odium of inevitable defeat. Some of its own members have urged that it was an injury to the prestige and influence of the Senate to refuse to allow the people to express a preference as to the method of election.<sup>20</sup>

The Senate's obstruction of the movement for this amendment has forced its advocates to turn to the untried method of amending the Constitution. The provision for the alternative process is as follows: "The Congress . . . on the application of the

<sup>20</sup> Not only was the Senate to a considerable extent consciously modeled on the House of Lords, but many analogies have grown up between them. The House of Lords is brought to terms by dissolution or by the creation of new peers. A similar practice obtains here. In 1890 the Senate passed a bill for free silver; it was beaten by the House by a narrow majority. Two years later a similar bill was defeated by the new House by a larger majority. In effect, this had been an appeal to the country. In 1893 a majority of 130 in the House bade the Senate heed the will of the people. Hence the Senate was passing the Repeal of the Purchase Clause, against its will, because it saw the *other* method impending—the creation of new senators, which would mean the leaving of old ones out in the cold. To stand in the way of repeal, would now be to say: "As for me, Hungry Oblivion, devour me quick!"—New York *Nation*, Vol. 57, p. 184 (Sept. 14, 1893).

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legislatures of two-thirds of the several States, shall call a convention for proposing amendments.”<sup>21</sup>

A sporadic example of attempting to apply this method was set as early as 1893 by the legislature of Nebraska. But no other State followed her lead until 1899, when the Pennsylvania legislature created something of a sensation by not only indorsing the demand for popular elections of senators, but also by providing for the appointment of a joint committee of five to confer with the legislatures of other States regarding the election of United States senators by popular vote. To the next legislature, this committee reported that as a result of their investigations they were of the opinion that the Senate would not take favorable action in relation to the election of senators by popular vote until resolutions were passed by the legislatures of two-thirds of the States making application to Congress for a convention to propose an amendment to the Constitution. The committee, therefore, recommended that the States apply to Congress to call such a convention, and that copies of a resolution appended to their report be

<sup>21</sup> Occasionally by Congress itself attention had been turned to this method. On the very eve of the Civil War (December 12, 1860) and apparently with the hope that amendments might be adopted which would avert such a conflict, Senator Pugh introduced a resolution: That it be recommended to the legislatures of the several States to apply to Congress, as soon as practicable, to call a convention for proposing amendments to the Constitution of the United States. Again, in 1876 Senator Ingalls offered a resolution recommending a convention which should revise and amend the Constitution. Nothing came of either of these recommendations. The States seem to have been very slow in taking up the initiative thus thrust upon their notice.

sent to the secretary of state of each State, to the president of the United States Senate, and to the speaker of the House.<sup>22</sup> This action was taken. At the next meeting of the legislature, provision was made for continuing the work of the committee and an appropriation was made for its expenses.

Meantime, the agitation had been bearing fruit. The Georgia legislature of 1900 made provision on December 19 for a similar committee of correspondence, and in the following year Arkansas took the same action. The results of this agitation, carried on by the three committees, are evident in the rapid increase of resolutions favoring a change, and in the fact that a uniform model has come to be generally followed, in which the old method of petitioning Congress for the submission of an amendment has been given up, and the legislatures now make direct application for the calling of a convention. Significant, also, is the change in phraseology. The older memorials "most respectfully request" Congress to submit the desired amendment; the present resolutions declare that the people are in favor of popular elections of senators, that the House has many times passed favorable resolutions by large majorities, but that the Senate has always refused to

<sup>22</sup> The committee further recommended the passage of "an Act of Assembly which shall provide that anyone elected a member of the United States Senate from Pennsylvania shall pledge himself to support and vote for the submission to the state legislatures of an amendment to the Constitution of the United States, which shall provide for the election of United States senators by popular vote." If such an Act were passed, it is much to be doubted if the Senate would exclude a man who after his election should refuse to give such a pledge.

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pass them. Then follows the blunt: "Resolved, . . . That application is hereby made to Congress to forthwith call a Constitutional Convention,<sup>23</sup> . . ." Further provision is usually made that copies of the resolutions be sent to Congress, and to the legislatures of all the States, with letters duly informing them of the action taken, and inviting their coöperation. The report of the Pennsylvania committee in 1901 declared that action favoring the election of senators by the direct vote of the people had been taken during the past few years by the legislatures of twenty-seven States, as follows:

Arkansas,	Kentucky,	North Carolina,
California,	Louisiana,	North Dakota,
Colorado,	Michigan,	Ohio,
Florida,	Minnesota,	Oregon,
Idaho,	Missouri,	Pennsylvania,
Illinois,	Montana,	Utah,
Indiana,	Nebraska,	Washington,
Iowa,	Nevada,	Wisconsin,
Kansas,	New Hampshire, <sup>24</sup>	Wyoming.

And to that list should now be added the following five States:

Georgia,	Tennessee,
South Dakota,	Texas,
	West Virginia.

At the present time, therefore, upon the authority of this Pennsylvania report, the legislatures of thirty-two

<sup>23</sup> Montana and Arkansas, 1903.

<sup>24</sup> I find no record of such action being taken by the New Hampshire Legislature since 1890.

States have taken formal action in one way or another, calling upon Congress to make it possible for the States to express their will upon this question. It is especially to be noted that within five years after Pennsylvania led this new departure, not less than twenty state legislatures made application to Congress for a Constitutional Convention. Nor can it be doubted that in the other ten or twelve States which favor this change there will be no reluctance and little delay in putting the address to Congress in the form of an application instead of a petition. What then? The Constitution says: "On application of the legislatures of two-thirds of the several States, the Congress shall [not may or ought to] call a convention." No option, no discretion is here reserved to Congress. When the necessary thirty applications shall have accumulated, will the Senate still attempt to block the proposal of the amendment by refusing to concur in the call for the convention? If it does, such an arrogant assumption of power will speedily react upon the men who commit it, and the personnel of the Senate will soon be changed. Unless the movement for direct popular election of senators suffers some unexpected reverse,<sup>25</sup> we are on the eve of seeing the final step taken in the proposing of the long-desired amendment.<sup>26</sup>

<sup>25</sup> See *supra*, Table II., p. 112.

<sup>26</sup> Of course, as has been said, the one reason why this untried method is now being advocated so strongly is that the Senate seems immovably opposed to allowing what is certainly a growing demand for change in the Constitution to come before the States in the ordinary way for their ratification. But opposition to the call of such a convention does not rest alone upon opposition to the election of senators by the people. Con-

**D. HOW SHALL THE AMENDMENT BE RATIFIED?**

Question has, likewise, arisen of late as to the method to be employed in ratifying an amendment, if it should be successfully proposed. Each of the amendments thus far added to the Constitution has been ratified by the first method provided by the Constitution: they have been submitted to and ratified by the legislatures of three-fourths of the States. But the Constiti-

servative statesmen are very reluctant to have a convention called for the purpose of amending the Constitution. There is an apprehension that such a convention would be dominated by radicals, and that, however much Congress might seek in its call to narrow the field of its operations, in the course of its sessions all such restrictions would be swept aside, and all sorts of amendments would be proposed—a proceeding which in itself would do much to undermine the people's veneration for the Constitution. Of our Constitution it may be said, as Bagehot said of the British monarchy: "Above all things it is to be reverenced, and if you begin to poke about it, you cannot reverence it." If a number of such amendments should be ratified, the United States would be swept far from its constitutional moorings. The example of the Convention of 1787 affords grounds both for such fears and also for confidence—fears, because that Convention, when it faced its vast problem, disregarded utterly its instructions and the restrictions imposed by the Articles of Confederation, and, as a result of its labors, put forth not amendments to the Articles, but a new Constitution to be ratified in violation of the provisions of the old; confidence, because that Convention, while assuming revolutionary powers, used them with sobriety, with a profound sense of responsibility. Despite surface ebullitions, the American people is still inherently conservative, and there is abundant reason to believe that the spirit of the men who grappled with the grave issues of the Convention of 1787 will not be found lacking in their sons if a convention is to be called in the near future, and that no vandal hand will then be laid upon the Constitution.

tution also provides an optional method, that amendments "shall be valid . . . when ratified by the legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress." Though this method has not been applied to any of the present amendments, it is to be remembered that it was by precisely this process that the Constitution itself was ratified, and—more than that—that its ratification would certainly not have been possible, had it been submitted to the state legislatures of 1788. This convention method has been earnestly advocated for application to the proposed amendment on several grounds. It would settle the question with less delay.<sup>27</sup> Advocates of the popular election of senators believe that that project stands in higher favor with the masses of the voters than with the members of the legislatures. If the ordinary process of ratification were used, the amendment would be defeated if the legislatures of thirteen of the States failed to ratify it. The chances of such an outcome are by no means slight, for the opportunities for obstruction are many. The dominance of the great parties, with their tradition of constant opposition to each other, no matter what the issue; the jealousy between the two houses of the several legislatures; "the inherent disputatiousness and perversity (what the Americans call 'cussedness') of

<sup>27</sup> Representative Shafrroth in *Congressional Record*. Vol. 31, p. 4819 (May 11, 1898). Mr. Bryce, on the contrary, calls attention to the fact that the procedure by national and state conventions might be slower and would involve controversy over the method of electing those bodies.

bodies of men"<sup>28</sup>—all these are ever-present obstacles which any proposed amendment must encounter. But the difficulties are greatly increased if, for any reason, the legislature as a body is little inclined to favor the amendment. Here is a measure which aims to strip legislatures of one of their greatest powers—the very power out of which scheming and self-seeking politicians are wont to make a large part of their capital. Not a few legislatures have proved servile tools in the hands of corruptionists or political gamblers, and from such interests the amendment must anticipate direct and determined opposition. Again, it has been thought that possibly some members, so little confident of the advantage of the proposed amendment as to be unwilling to vote for it themselves, would nevertheless not feel justified in voting against a call for a convention, since, by so doing, they would deprive the people of an opportunity to pass upon the question at issue. Finally, it is to be remembered that the terms of legislatures differ. In the majority of States the session is biennial, and in the odd year. But in some States the term of both branches is four years—Alabama, Mississippi and Louisiana—while in twenty-nine States the term of senators is four years. Hence, it might happen that a considerable part of the legislatures to which the proposed amendment might be submitted would have been elected two or three years before, when there was no anticipation of such a matter coming before them. Even if the legislature had been elected so recently as still to be closely in touch with its constituents, it is not unlikely that it would have been elected with no

<sup>28</sup> Bryce, *The American Commonwealth*, I., 369.

especial reference to this issue. On the whole, it is probable that, if the attempt is to be made to amend the Constitution in this particular, it will be politic to make trial of the thus far unused process, not only for the proposal, but also for the ratification of the amendment.<sup>29</sup>

Since the preceding pages were in type, the Iowa legislature has taken action which promises to test more accurately than ever before the extent and the genuineness of the demand for this amendment. By large majorities in each branch (*Senate*, February 23, yeas 28, nays 9; *House*, March 12, yeas 57, nays 22) a joint resolution was adopted, which has received the signature of Governor Cummins. After a preamble of the conventional form which introduces a State's application to Congress for the calling of a convention, it proceeds to authorize and direct the Governor of the State of Iowa "to invite the Governors of the various States to appoint and commission five delegates from each of their respective States to constitute an Interstate Convention, to be held in the city of Des Moines, Iowa, or elsewhere, to be convened in the year 1906, for the purpose of securing such action on the part of the several States as will result in the calling of a constitutional convention for the proposal of an amendment to the Constitution of the United States providing for the election of United States senators by a direct vote."

## CHAPTER VI

### POPULAR CONTROL OF SENATORIAL ELECTIONS

WHEN Thomas Paine declared that a constitution did not exist as long as it could not be carried in the pocket, he but expressed the faith of his countrymen in the high efficacy of that new political device, the written constitution, which American example was to commend to the acceptance of other countries. The result of the Federal Convention's long months of labor took form in what has come to be regarded as the typical rigid constitution. It may well be that to its framers the process of amendment, in contrast with that provided by the Articles of Confederation, seemed dangerously relaxed. Nevertheless, to-day, with all the amendments which four generations have added, it may be read through aloud, so Mr. Bryce tells us, in twenty-three minutes. Yet, this terse and rigid constitution has served as the frame of government for a great federal state throughout a century of marvelously varied development. He who would understand this anomaly must give diligent heed to the custom, not less than to the law, of the Constitution, realizing the vital truth of the dictum of Sir James Mackintosh: "Constitutions grow; they are not made." No written law, however great authority it may claim, can long withstand the determined will of the people, demanding

change. "What time cannot blot out, it interprets." And the more rigid the Constitution, so much the more inevitable and the more radical becomes this subversive interpretation, when once it comes to be believed that time has made ancient good not only uncouth but dangerous to the public weal.

Thus, the Constitution requires that the senators from the several States be elected "by the legislatures thereof." Gradually, however, the feeling has become widespread that many of the men who, in recent years, have found their way to the Senate, are little disposed to hold themselves responsible to the people, or to heed the broader interests of the country. Rightly or wrongly, this imperfect sense of responsibility shown by the senators is being attributed in increasing measure to the process and organ of their election; and the same distrust of state legislatures which has led to the stripping away of many of their powers, through amendments to state constitutions and other forms of direct legislation, now gives rise to the demand that the choice of senators shall no longer be left to the caprice of these legislatures, but that it shall either be taken away from them entirely, or, at any rate, be subjected to effective popular control. The first of these demands is the basis of the propaganda, first put forward eighty years ago, and in the last decade rapidly growing in volume and insistence, that the Constitution be so amended as to provide for the election of senators by the direct vote of the people. In many respects this seems both the most direct and the most natural method of securing senatorial responsibility. Yet the obstacles in the way of its attainment have hitherto proved

insuperable. They are raised not only by those who have no faith that popular election would prove an effective remedy, but by those, as well, who regard such a change of the Constitution as either impossible or inexpedient. Nevertheless, during the past decade the agitation in favor of this amendment has acquired such force and definiteness that to many its adoption seems close at hand.

But, meantime, much the same goal has been sought by a very different route. In true English fashion, custom and precedent have here been at work changing the spirit and import of the law while its letter remains ever the same. Sometimes by mere tacit understanding, sometimes by the insistence of political parties, sometimes by the direct and positive interposition of state law, this movement has gone forward with ever-increasing force, until a point has been reached where it is well to take a survey of what has already been done, and attempt a forecast of what may yet be accomplished in the way of securing popular control over senatorial elections without recourse to amendment of the Federal Constitution.

Notwithstanding our rigid Constitution's decree that the senators from the several States shall be elected by "the legislatures thereof," this act of the legislatures may be deprived of nearly all of its vitality. The election of President offers an illustration of the filching of actual power away from the electors in whom it is vested by law. When James Russell Lowell, a Republican elector for Massachusetts in 1876, was urged to exercise his independence and vote for Tilden, he declined, saying that "whatever the first intent of the

Constitution was, usage had made the presidential electors strictly the instruments of the party which chose them."<sup>1</sup> The Constitution remains unchanged, yet presidential electors recognize that they have been stripped of all discretion. It appears that under certain conditions the election of senators by state legislatures has been and can be made an equally perfunctory affair.

The simplest way in which popular suggestion or pressure may be brought to bear upon the legislature is through the indorsement or nomination of some candidate for senator by the state convention of the party. Thus, in April, 1858, the Illinois State Democratic convention gave its indorsement to the position which Douglas had taken on the Kansas question. Everyone recognised this as equivalent to naming him as the party's candidate for reëlection to the Senate by the legislature which was to meet a few months later. The Republicans promptly put forward Lincoln as his opponent, and at their convention in June passed the following resolution: "Hon. Abraham Lincoln is our first and only choice for United States senator, to fill the vacancy about to be created by the expiration of Mr. Douglas's term of office." In point of law, the great debate which followed was but an incident in the election of a legislature, with which alone rested the power of electing a senator, but the whole country knew who was to be senator as soon as the votes for the members of the legislature had been counted. The issue between these two candidates had been so dominant, the people's will so directly expressed, that doubt or hesitation was out of the question. Four years later, Charles Sumner

<sup>1</sup> W. D. Howells, in *Scribner's Magazine*, Vol. 28, p. 373.

had lost favor with certain elements of the Republican party in Massachusetts, on the eve of the expiration of his second term. His adherents, therefore, were determined that the party should be pledged to his support, and, in the state convention, they secured the adoption, not without opposition but with much enthusiasm, of a complimentary resolution nominating him for reëlection. In the legislature his election followed without opposition and as a matter of course.

Yet, this method does not always yield assured and satisfactory results. In both the cases cited, only two great parties were pitted against each other, and the issue between them was clearly drawn. But, in the more tangled political conflicts of recent years, where parties are split into factions, and where issues are purposely blurred, the skirmish in the convention by no means decided the campaign. When the legislature meets, the chances are that no one of the convention-indorsed candidates will secure a clear majority on the first ballot, and, in the attempts to form coalitions, the restraints of the convention's instructions soon get relaxed. Even if the man of the convention's choice is finally elected, it is only after a bitter contest, in which charges of bad faith and corruption are freely exchanged. Precisely such an experience, for example, was had in the Minnesota election of 1893, in the hard-fought election of the late Senator Cushman K. Davis; and public resentment found expression in such editorial comment as this: "When the legislators refuse to vote for a candidate who has been indorsed by the people, by the party convention and the united party action, and for such refusal are able to offer not a

syllable of objection to the candidate's moral and intellectual fitness, it is time that such men were not given power to defeat the people's will."<sup>2</sup> Except in States where one united party has an overwhelming majority, therefore, until the choice of senator comes to be the dominant issue in the election of members of the legislature, they will continue, whether for good or ill, to exercise not a little independence of convention restraints, to the occasional confounding of the people's best hopes and most confident expectations. Moreover, it must not fail to be observed that, while this designation or indorsement of a senatorial candidate may, under certain conditions, amount to the virtual election of the senator, it involves not one whit of genuine popular control of senatorial elections, unless the party machinery in the State is so contrived and so operated as to insure a trustworthy expression of the people's choice.<sup>3</sup> Otherwise, it amounts merely to the choice of senator by a servile convention at the dictation of the ring or the boss, and the last state of that election is worse than the first.

In recent years, no other department of political legislation of the several States has been subject to such restless change as that relating to the nomination of candidates for public office. Repeated and painful experience of the abuses of party machinery, and, in particular, of the delegate nominating-convention, has led to the determined movement for the securing of the direct primary. Throughout the country the dominant tendency has become to accord to the people, in form, at least, the right and the opportunity to share in the

<sup>2</sup> *Minneapolis Tribune*, Jan. 21, 1893.

<sup>3</sup> *Infra*, pp. 223-225.

choice of men for the public service. Although the senatorship lies outside the state system, direct recourse to the people in the primaries for the selection of senatorial candidates finds a precedent as early as 1890. Again, as in the indorsement of senatorial candidates by party conventions, it was Illinois which set the example. Says Senator Palmer:

“Election of senators by a popular vote, which by common consent should control the members of the legislature, was not novel to the people of Illinois, for they were familiar with the great contest of 1858.

“In 1890, the state committee of the Democratic party, in connection with the call of the state convention, put two propositions before the voters: (1) the propriety of a nomination by the proposed state convention of a candidate for senator, to be voted for by the people at the next election, as directly as possible under the provisions of the Constitution; and (2) the selection of a candidate for senator, if it should be determined that a candidate be nominated.

“Result: Primary conventions held in more than ninety out of the 102 counties of the State, including the County of Cook, which now contains nearly, if not fully one-fourth of its population, determined to nominate a candidate, and indicated their preference for the person to be presented to the people. The state convention expressly approved the plan of direct election and indorsed the candidate. He accepted the platform and toured the State. On the issues, 101 (out of 202) members were elected to the legislature by an aggregate plurality of 30,000 and over. These ‘one hundred and one’ members of the legislature, regarding themselves as electors chosen to register the will of the people, between the 21st day of January, 1901, and the 11th of March, voted for the candidate nominated in 153 ballots, and on the 154th ballot they were joined

by two members of the House of Representatives who were favorable to the election of senators by the direct vote of the people of the several States, and on that ballot a senator was elected."<sup>4</sup>

It was by virtue of the will of the people, thus directly expressed in his own nomination and election, that Senator Palmer felt himself called of the people to stand forth as their champion in the Senate in the fight for the amendment of the Constitution. Yet, this very experience shows how far from effective, in such a State as Illinois, is the popular control which can be exercised over senatorial elections by direct nominations indorsed by party conventions and followed by the election of legislators upon this as the main issue. For, although Palmer's candidacy was backed by a "plurality of over 30,000," the legislature was in deadlock for nearly seven weeks before his election was effected, and even then it was brought about only by the votes of two men who, as his opponents asserted, had been pledged to vote against him.<sup>5</sup>

It is in the States where a single party has so established its dominance as virtually to take over to itself the functions of the State, that the direct primary has found most ready adoption. So congenial has this new institution proved throughout the South, that it "is now no unusual thing for the number of votes cast in a general election to fall to a very small proportion, sometimes as low as from ten to twenty-five per cent. of the vote cast in the nominating primary for the same can-

<sup>4</sup> *Congressional Record*, Vol. 23, p. 1267.

<sup>5</sup> Compare Senator Chandler's account of this election, *Congressional Record*, Vol. 23, p. 3197 (April 12, 1892).

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dicates.”<sup>6</sup> As the people of the Southern States have accustomed themselves to “take part in the choice of their [State] officials almost entirely by the indirect method of sharing in the selection of the candidates of one party,” it has been almost inevitable that the same procedure should be extended to the choice of senators, and, without any explicit provision of law in most of the States, senatorial contests have come to be finally decided in the primaries. How closely this method may approximate to a popular election of senators is clearly shown by Governor Jeff Davis of Arkansas:

“The last state convention adopted a resolution that the candidate for the United States Senate receiving the highest number of votes in the primaries should be declared the choice of the Democratic party for the United States Senate by the state convention, just as they declare the nominees of the party for state offices, and, of course, the legislature has no duty depending upon them but to cast their vote for the person declared the successful candidate by the state convention. This is absolutely equivalent to the election of the people. You see, this can happen in this State because the nominees of the Democratic party are considered as elected, as our legislature consists of 135 members and only two are Republicans.”<sup>7</sup>

To show the extent to which, in many States, the legislature’s function in the election of senators has become atrophied, it is only necessary to note the growing frequency of unanimous elections. In 1900, Sena-

<sup>6</sup> Francis G. Caffey, in *Political Science Quarterly*, Vol. 20, p. 61 (March, 1905).

<sup>7</sup> Letter of Governor Davis to the writer, August 29, 1904.

tor Morgan received a unanimous election from the Alabama legislature, and, in Louisiana, two senators were thus elected. In 1901, Senator Tillman was thus returned to the Senate from South Carolina; in 1903, the vote was unanimous for Pettus in Alabama, and for Latimer in South Carolina.<sup>8</sup> In 1904, Foster, in Louisiana, and both Money and McLaurin, in Mississippi, were unanimously elected. Upon the surface, these election returns might seem to indicate such preëminent qualifications in the senators chosen as totally to eclipse all other candidates. As a matter of fact, however, many of these unanimous elections have been preceded by the most acrimonious of campaigns. The unanimity of the election in the legislature merely signifies that, inasmuch as all the questions had been settled in the primary, "the election itself is a mere legal formality, to which no more attention is given than is necessary to record the result of the primary."<sup>9</sup>

<sup>8</sup> *Infra*, p. 158.

<sup>9</sup> Francis G. Caffey, as above.

The procedure in one of these elections may be illustrated as follows: In May, 1897, the death of Joseph H. Earle caused a vacancy in South Carolina's representation in the Senate. Primaries were ordered for August 31 to ascertain the choice of the people. The Democratic state committee marked out a plan of campaign for two months, and the candidates made speeches in every county. They were J. L. McLaurin, ex-Governor Evans, ex-Senator Irby, S. G. Mayfield and J. T. Duncan, but the last two withdrew after a short time. The canvass was most excited and the speeches were sometimes bitterly personal. McLaurin was assailed as a protectionist, having voted in favor of protectionist amendments to the Dingley tariff bill. The vote stood: McLaurin, 29,326; Evans, 11,375; Irby, 5159. *Appleton's Annual Cyclopædia*, 1897, p. 734. In McLaurin's sketch in the Congressional Directory the purely perfunctory nature of the legislature's part in the election is suggested: "He was nominated at a Demo-

Throughout the South this method of nomination has been introduced as a mere matter of party rules, binding upon the dominant party, and hence having the effect of genuine laws. In Mississippi, on the other hand, the act of 1903<sup>10</sup> invokes the strong arm of the law to regulate the primary and to make it as much a function of the state as is the election itself. This law abolishes all nominating conventions of whatever grade, and makes specific provision for the nomination of all elective officers, including United States senators, by direct primaries. In other sections of the country, too, the direct primary is making rapid progress, and the recent laws of Minnesota, Michigan, Indiana and Massachusetts provide machinery which may readily be adapted to the nomination of senators,<sup>11</sup> while the new laws of Wisconsin and Illinois proceed directly to that goal.<sup>12</sup>

cratic primary, receiving a majority in forty-one of the forty-five counties of the State; the legislature ratified the action of the primary by electing him senator."

<sup>10</sup> By some writers this is considered the ideal direct nomination law. Edward Insley, in *Arena*, Vol. 29, pp. 71-5 (January, 1903).

<sup>11</sup> In so conservative a State as Massachusetts, during the session of 1905, the legislature considered a petition for legislation to provide for the nomination of candidates for senator by the direct vote of the people.

<sup>12</sup> Neither of these laws has, as yet, received a trial. The significant sections of the most recent primary election law—the Illinois Act of May 18, 1905—are as follows:

*Section 22.* . . . "Any candidate for the nomination for United States senator shall have his name printed on the primary ballot of his political party in each county by filing in the office of the secretary of state, not less than thirty (30) days before the primary election, a written request substantially in form as the foregoing request provided for by candidates for governor. The vote upon such candidates for United States senator shall be had for

In Western States, the tendency in recent years is not to rest content with the designation of senatorial candidates by the state convention, nor even with the nomination of candidates by the primaries; but, rather, to insist upon going through all the forms of a popular election, the whole process being under the supervision, not of party leaders, but of state officials. Thus, as early as 1875, the following proposition was submitted by itself to the voters of Nebraska, and was by them adopted as a part of the new constitution of that year: "The legislature may provide that, at a general election immediately preceding the expiration of the term of a United States senator from this State, the electors may, by ballot, express their preference for some per-

the sole purpose of ascertaining the sentiment of the voters in the respective parties. Every candidate for governor and for United States senator shall further file with the secretary of state a petition signed by not fewer than 5000 legal voters, members of the party in which he is a candidate for nomination. Not less than twenty-five (25) days before the primary election, the secretary of state shall certify to the county clerk of each county the names of all the candidates for governor and United States senator, together with their political affiliations, as specified in the written requests on file in his office. Each candidate for governor and for United States senator of the respective parties shall pay to the secretary of state a filing fee of one hundred (\$100) dollars."

*Section 49:* "The secretary of state shall cause to be delivered to the secretary of the state convention of the respective parties next following such primary election . . . the total voted by the counties for each candidate for governor of the respective parties. It shall be the duty of the secretaries respectively of the county, senatorial, congressional and state conventions, to read to the convention before any candidate is put in nomination, the total vote, by counties, received by each candidate of the respective party voted for upon the primary ballot provided for in this act."

son for the office of United States senator. The votes cast for such candidates shall be canvassed and returned in the same manner as for state officers."<sup>18</sup> This thoroughly democratic provision for a preliminary popular election for a long time was absolutely unique; yet the people of Nebraska have seemed to take little interest in it. In twenty-five years and more, since it became a part of the Constitution, they have rarely used it, for its first serious trial yielded results that were both significant and discouraging. In 1886, General Van Wyck made an active canvass of the State in his own behalf as an anti-monopolist. Neither the Republican nor the Democratic party put forward a senatorial candidate in the popular election in November, at which, although 138,209 votes were cast for governor, only 50,448 voters expressed a preference for senator; of these, more than ninety-one per cent. voted for Van Wyck. When the legislature met, he led on the first two ballots, receiving forty votes out of one hundred; but he failed to secure the election, a result which he attributed to the interference of railroad officials and monopolists. As to the present attitude of the people toward this election, the Governor of Nebraska writes:

"In 1898 this matter was included in the proclamation, but there was a very feeble response. From most counties no returns were made. In the fifth and sixth congressional districts combined [which would normally contain not less than 75,000 voters] only 626 votes were cast on this preference. It appears to be generally popular throughout the State, but there is a

<sup>18</sup> Nebraska Constitution, Art. 16, Sec. 312.

general apathy when it comes to placing the matter on the ballot.”<sup>14</sup>

<sup>14</sup> Letter of Governor Jno. H. Mickey to the writer, August 31, 1904.

Since 1879, when enabling legislation first made this provision effective, there have been nine senatorial contests to which this device could be applied. In two of these, 1882 and 1892, no votes of preference were canvassed by the state board, although votes were cast in some counties. In three, 1880, 1888 and 1898, a scattering vote was cast, in no instance approaching 5 per cent. of the total vote. In the four elections in which the votes of preference reached considerable numbers the results were as follows:

Date.	Total Vote in State Election.	Total Votes of Preference for Senator.	Vote for Lead- ing Candidate.	Senator Elected by Legislature.
1886.....	138,711	50,064	46,110	2,326
1894.....	210,547	108,313	80,472	1,866
1900.....	251,005	62,995	45,838	0
1904.....	232,457	110,172	107,595	107,595

In 1894, for the first time the casting of the votes of preference had been preceded by formal nominations on the part of Democrats and Prohibitionists; the Republicans had made no nominations, but controlled the legislature, and so elected their candidate, who had received no considerable support in the popular vote. In 1900 no party nominations had been made, but, on petition of 5000 voters, the name of one candidate was printed on the official ballot. At the end of a deadlock which lasted throughout the session, the legislature elected two men who had not previously even been mentioned as candidates. In 1904, the Republicans made the only nomination before the popular vote, and, as they controlled the legislature, for the first time in the history of this Nebraska law the candidate who won at the polls became senator.

Dr. Victor Rosewater, of the *Omaha Bee*, to whom the writer is indebted for these interesting details, draws the following conclusions:

“From this review it will be seen that the effectiveness of the constitutional provision for popular control of senatorial elections in Nebraska depends chiefly upon the form of the ballot. Where no party nominations are made and the voter must write

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In other States, more recent laws have been framed upon this subject with greater and greater particularity. Their titles and preambles leave no doubt as to their motive. Thus, in 1899, Nevada enacted a law entitled: "An Act to secure the election of United States senators in accordance with the will of the people, and the choice of the electors of the State, and to obtain an expression of such choice and to prevent fraud and official dereliction of duty in connection with such elections." This law provides that candidates for the Senate may be nominated in the same manner as the candidates for the state offices; the names of the senatorial candidates having been given a place upon the ballot, the votes upon them are certified in the same manner as upon the other candidates; and the secretary of state is required to transmit the results to the legislature, when it meets for the formal election. Accordingly, in Nevada, on the same day a party convention nominates—as was done August 10, 1904—candidates for the United States Senate, for representatives in Congress and for judge of the State Supreme Court. The subsequent election process in the case of all these candidates is precisely the same, except that,

in the name of his choice no sufficient centering of votes can ensue. Where a political party has a candidate under whose standard it is rallying, and for whom all the straight party votes are counted, he will make as good a showing as his associates on the ticket, but no matter how large a vote may be cast for him, it does not insure control of the legislature by his party following. In a word, the vote of preference has not proved to be as binding as the nomination by the party. The tendency, therefore, is to supplement this device in the constitution by primary legislation that will by a similar method give popular control of party nominations."

whereas the election of the judges and of the member of Congress is complete when the returns of the popular vote are duly certified, in the case of the senator the only election of which federal law takes any account does not begin until months later, when the legislature takes up that task. All these elaborate operations are but a complicated method of bringing moral pressure to bear upon men who, in spite of it all, have a perfect legal right to vote for the man of their party allegiance or of their personal liking.

By the Oregon law of 1901, as in Nevada, the whole process is assimilated to that employed in the election of state officers; in one respect, however, the people's choice for senator is more forcibly obtruded upon the legislature. Duplicate copies of the returns are to be sent to the House and to the Senate; and their respective presiding officers are required to "lay the same before the separate Houses when assembled to elect a senator in Congress as now required by the law of Congress, and it shall be the duty of each house to count the votes and announce the candidate for senator having the highest number, and *thereupon* the Houses shall proceed to the election of a senator, as required by the Act of Congress and the Constitution of this State." The plain intent of this law was to subject senatorial elections to a popular control more direct and more imperative than had ever before been attempted by any State. It would hardly be possible to say to the legislature more plainly: "This is the way. Walk ye in it." What has been the result? At the assembling of the next legislature, after the enactment of this law, Governor Geer put before them the situation as follows:

"In obedience to a general demand from the people and the press of the State, the last legislature passed a law providing for a direct vote on candidates for United States senator. After a careful revision during its passage this law was enacted by a vote that was practically unanimous, and in exact accord with its provisions the popular vote was held last June. . . . In many States of the Union the result of this first attempt at the popular vote for United States senators is watched with much interest, and its prompt observance and ratification will not only encourage its adoption in other States, but will prove the sincerity of our protestations in favor of popular election of senators and render impossible a repetition of former experiences in Oregon, to prevent which this law was formulated, supported and adopted."

This experiment certainly deserved the serious attention of the other States, but the note of strenuousness in the governor's words in reference to it may possibly be related to the fact that he himself was the candidate who had carried the popular election by a large majority. On the very day when the legislature had been thus exhorted,<sup>15</sup> with all due formality, there were transmitted to the separate houses of the legislature copies of an abstract of votes cast at the general election, held during the previous June, for senator in Congress. In the House, the speaker appointed a committee of three to assist in canvassing the vote, and the result was announced as follows:

For T. T. Geer.....	44,697
For C. E. S. Wood.....	32,627

The record proceeds: "The election of United States senator being next in order, Mr. Denny placed in nomi-

<sup>15</sup> January 20, 1902.

nation Hon. T. T. Geer, J. W. Phelps placed in nomination Hon. C. W. Fulton, Mr. Galloway placed in nomination Hon. C. E. S. Wood. The roll was called with the following result: Geer, 12; Fulton, 19; Wood, 12"—and scattering votes for eleven other candidates. Thus, the man who had secured a majority of thirty-seven per cent. in the popular vote received only a small minority on this first ballot in the House. The election was thrown into the joint assembly, and there the deadlock, which seems to have become the normal thing in the legislatures of Oregon, was forthwith begun. Not until it had lasted more than five weeks, at a night session, on the forty-second joint-ballot, did it become possible to elect as senator a man for whom not a single vote had been cast in this much-vaunted popular election which had been instituted for the express purpose of affording the people "an opportunity to instruct their senators and representatives in the legislative assembly as to the election of a senator in Congress from Oregon."<sup>16</sup>

But schemes for controlling the legislature's choice have gone even further. In Colorado, there was recently introduced a bill of a much more radical nature. It provided that, at the general election next preceding the time for electing a United States senator, each political party might place upon the ballot the names of five or less candidates for the Senate; and it bound the members of the legislature under penalty of expulsion to vote for the candidates of their respective parties receiving the greatest number of popular votes. This would do little more than incorporate into law what

<sup>16</sup>Preamble of the law of February 26, 1901.

already has the force of law in some of the States. Thus, in South Carolina, candidates for the legislature are placed under oath to abide by the results of the primary.<sup>17</sup> This bill did not become a law. Had it done so, its constitutionality might possibly have been successfully contested. But its purpose was highly significant of the growing determination on the part of the people of the Western States that, in electing senators, their state legislators, except within the narrowest limits, shall presume to exercise no independence of choice, but shall merely register the people's expressed will. The fundamental idea in this novel Colorado proposal, it is interesting to note, has received the approval of distinguished authority. In the debate over the law of 1866, both Senator Williams and Senator Sumner insisted that, although the Constitution directed that senators should be chosen by the legislatures, their constituents had a right to instruct the members as to their votes for senator, and had a right to be obeyed; in other words, their instructions would be binding upon the members.

Indeed, this idea of an instructed vote has been the basis of a suggestion more radical even than this Colorado proposal—that the States, by law, provide for a preëlection of senatorial candidates, and “that the members of the legislature of whatever party should respect the wishes thus declared.” A statute requiring the members of the legislature to “respect the wishes of the people,” as declared at a preliminary election, could mean nothing else than the requirement that they accept and merely register the people's choice thus

<sup>17</sup> Jesse Macy, *Party Organization and Machinery*, p. 195.

declared. The author of this suggestion adds: "thus the question as to who should be elected to the state legislature would not be at all involved." But this conclusion is by no means warranted. Whatever the phrasing of the law, it could go no further than directing the members to vote for the designated candidate. Under conditions even remotely resembling those which we at present know in many of our States, the question of the senatorial election would be deeply involved in the choice of the members of the legislature; for it is not conceivable that, if the plurality in the preliminary election were a very close one—if, for example, the vote stood in some such ratio as 5:4:3—the members of the legislature would meekly "respect the wishes" of five-twelfths, not of the people, but of the voters who went to the polls, so long as the supreme law of the land indisputably places the election of senators in the hands, not of the people, but of the legislature.

It may prove possible, however, for the States to give the people free power of nomination, and yet leave to the legislatures a power of election which has not been reduced to a mere form. Along this line it has been suggested that the names of all candidates who receive a certain number, say 3000 or 5000, in the direct primaries, be printed upon the official ballot at the state general election; and that the five or ten, who stand highest in that election, be certified to the legislature. Each member of the legislature would then vote, on the first ballot, for three on the list; and, on the second, for one (or two, as the case may be) out of the three highest, as determined by the first ballot. Among the benefits to be expected from such an elective

process, it is predicted that choice would no longer be a choice of two evils; for the people would eagerly scan their own list of candidates, and these would have a decided prestige as against the product of intrigue and jobbery; also that worthy candidates would "tend to multiply, since they could allow their names to be used without loss of self-respect, and with no obligation to work in their own behalf."<sup>18</sup> This scheme has been criticised as "academic," yet it has much to commend it for practical experiment. The constitutionality of limiting the legislature's range of choice to the list of candidates sent up by the people may be questioned; but even if such a limitation were not rigidly enforced the list of nominees with such backing could not fail to have a large measure of influence.

In all these state laws, and proposals of legislation, the obvious motive has been to make the election of senators in essence direct and popular, while keeping "constructively" within the prescriptions of the Constitution. The fact that this object has been in effect attained in the election of the President, seems to warrant the belief that the problem of securing popular control over senatorial elections may be as readily solved. But argument from analogy, always open to suspicion in regard to political institutions, becomes especially deceptive here. In the first place, the presidential electors are chosen for one function only, a single elective act. Attention, in fact, is focused not on the persons to be chosen to the perfunctory office, but upon the presidential candidate whose name looms

<sup>18</sup> W. P. Garrison, "The Reform of the Senate," in *Atlantic Monthly*, Vol. 68, pp. 227-234 (August, 1891).

so large at the head of the ticket that we forget that in law we are not voting for him. It follows that in the mind of the voter, and of the presidential elector as well, this popular vote constitutes a clear mandate; it decrees the people's choice for President. But in the election of members of the legislature, on the other hand, widely diverse issues are involved; which cannot fail to produce confusion, and which may prove irreconcilable and mutually exclusive.<sup>19</sup> The election of one candidate for the legislature in preference to another, therefore, can be regarded as a clear expression of the voters' preference as to candidates for the national Senate only where state politics and issues are wholly dominated by the national parties.

Not only is the choice of the presidential elector a far more clear and imperative mandate than that of the senatorial elector, but, when once he is in office, he has but one thing to do, and that single act is performed under the eye of the public, so that there cannot be the slightest question whether he has executed his commission. But the election of senators is devolved upon the members of the state legislature, as an addition to heavy and manifold duties in the service of the State. As long as the Constitution continues to declare that the election of senators shall be by the legislatures, it is not probable that men of the caliber needed for the work of state legislation will consent—nor is it fitting that they should consent—to act as mere puppets in registering a choice already made. If it be claimed that, under the party system as it is developing, there now remains no room for the assertion of independence and

<sup>19</sup> *Infra*, p. 185.

of individual discretion, the reply is that such can be the case only under a tyranny of national parties which would be most injurious to the interests of the state. Where parties are nearly evenly balanced, it is not to be conceived that the issue would not be fought out anew in the legislature instead of being accepted as settled in some preëlection by the people.

Both theory and experience indicate, then, that attempts to secure popular control of senatorial elections, without constitutional amendment, are likely to amount to this: in States where one party is firmly intrenched in power, popular control can be asserted in the way of anticipating what would have been the probable action of the legislature. This has been done in the South. In other States, popular control could be secured only at a cost of intensifying to a most unfortunate degree the dominance of national parties over state and local politics. In the pivotal States, such as New York, New Jersey, Ohio and Indiana, it would prove a delusion and a snare. Yet, in this group are not a few of the very States where senatorial elections are now most unsatisfactory and where some effective popular control is most needed. And herein lies the reply to those who plausibly urge that under the present state laws in subversion of the Constitution popular control can be asserted "where the people want it." If a State hangs in the balance between two or more parties or factions, or if it be dominated by a boss, these laws for effecting popular control become waste-paper. Yet conditions such as those mentioned are no evidence that, in those States, the people do not want popular control; indeed, they may be most eager for it, as the sole remedy for the ills from which they suffer.

## CHAPTER VII

### THE ARGUMENT FOR POPULAR ELECTION OF SENATORS

IF, then, genuine popular control over senatorial elections is to be secured only by direct elections under an amendment of the Constitution, would the gains from popular elections, thus secured, outweigh the losses? To the attempt to answer this question the succeeding chapters are devoted. There is first attempted a candid and sympathetic setting forth of the arguments of those who favor, and then of those who oppose popular election of senators.<sup>1</sup>

#### A. POPULAR ELECTION WOULD MAKE THE SENATE A MORE CONSISTENT AND EFFECTIVE POLITICAL INSTITUTION.

1. *The present method of electing senators is a relic of what has long since become obsolete.* The election of senators by the legislatures reflects the distrust of the people which characterized many of the leaders of the Convention. That the members of the upper branch of

<sup>1</sup> Although this form of presentation may lay the writer open to the charge of "blowing, now hot, now cold," he is confident that it is the method which will enable the reader to get the clearest understanding of the question at issue. In notes and in cross-references, he has sought to indicate where opposing arguments or varying opinions need to be brought to bear upon a particular point.

the Congress should be appointed by the executive, that they should serve for life and without pay, were some of the suggestions of men like Gouverneur Morris, who wished to insure that the Senate be made up of men of great wealth in order that they might the better "keep down the turbulency of democracy." In the debate upon this point, James Wilson was the only man to urge popular election. Far more in accord with his colleagues was Roger Sherman when he declared that "the people immediately should have as little to do as may be about the government. They want information, and are constantly liable to be misled." In similar vein, Gerry asserted that the evils they were experiencing flowed from the excess of democracy; and from Massachusetts to South Carolina, members bore witness to the people's ill-advised advocacy of such schemes as the issuing of paper money as a legal tender—for defense from which the greater intelligence of the legislatures had been the only reliance. Such sentiments could hardly find expression in a constitutional convention of the nineteenth, still less of the twentieth century. The point of view has changed. Since the time of Jackson, one might almost say since the election of Jefferson, the increasingly dominant note of American democracy has been that government must be not a government by some aristocracy of wealth or intelligence, but by the people. Hence, property qualifications for the suffrage and for the holding of office have been swept away, terms of office have been shortened, state officers, from the governors to the judges, in the great majority of the States, have come to be elected directly by the people, and, more and

more, even the power of making the laws is being transferred from the representative legislature to the voters, registering their own will in person at the polls. Squarely in the road of democracy's consistent advance, a barrier with all the tremendous power of resistance possessed by a clause of the Constitution, stands this eighteenth-century device for electing senators.

Again, this elective process represents what many regard as an unsound political theory, and one which has been almost universally discarded—the belief in the superior efficacy of delegated authority. This notion did not necessarily imply any distrust or dispragagement of the people. Madison insisted with vigor that the first branch of the Congress should be elected by the direct vote of the people, but he also—and with explicit reference to the election of the second branch—declared himself “an advocate for the policy of refining the popular appointment by successive filtrations.” Not a few members of the Convention laid emphasis upon “the refinement in the choice” which would be secured by making the senators the elect of the legislatures, rather than of the people. The early commentators, both American and foreign, found in this indirect election of senators a distinct merit of the Constitution. But men of the present day seem to have lost faith in a filtration which does not filter, a refinement which does not refine. Nothing could afford a better gauge of the extent to which this faith in the superiority of a choice by delegates, rather than by the voters, has become a thing of the past, than the rapid progress and wide diffusion of the movement to replace delegate nominations and even elections by the direct

action of the people. But an illustration more directly pertinent to the point under discussion, is afforded by the fate which has befallen the electoral college to which the Constitution committed the choice of President. From this device the members of the Convention anticipated the same advantages in the filtration of the choice that they looked for from the election of senators by the legislatures. Yet, for half a century, it may be questioned whether any member of an electoral college has seriously entertained the thought of voting for the man of his own independent preference.

In fact, the process of electing senators incorporated in the Constitution may be said to stand for something more fundamental than either an aristocratic distrust of the people or an academic approval of indirect election; it stands for the vanished economy of the eighteenth century, for the fringe of seaboard States loosely linked together; for the age when the Declaration of Independence, signed in Philadelphia on the 4th of July, was not heard in Worcester till the 13th, nor printed in New England till the 17th; for a period when "two stages and twelve horses sufficed to carry all the travellers and goods passing between New York and Boston, then the two great commercial centres of the country," a wearisome journey which occupied not less than six days.<sup>2</sup> With such means of communication, the forming of public opinion and government by discussion were things of great difficulty. A candidate could hardly become known throughout his State; and, hence, elections by legislatures had for years been

<sup>2</sup> McMaster, *History of the People of the United States*, Vol. I, p. 450.

in satisfactory operation as to governors, judges and members of the national Congress before the system was copied in the Constitution for application to the Senate. But, in these days of the linotype and the Hoe press, of the ubiquitous trolley-car and of the Twentieth Century Limited, of the telephone and of wireless telegraphy, this process of electing senators, coeval with communication by stage-coach and post-rider, survives, it is felt, as a quaint anachronism. It is fitting that even one of the slowest growing and most conservative States should be the very one to furnish the advocates of a change an illustration as to how out-of-date this device has become. In the Constitutional Convention, it was a member from South Carolina, Charles C. Pinckney, who was most positive in his expressions of distrust of the people for so responsible a task as the electing of senators; who argued that the legislatures would show far more intelligence and self-restraint in the choice; and who expressly declared that an election of either branch of the national Congress, by the people, scattered as they were in South Carolina, was "totally impracticable." Yet, each of the senators from South Carolina in the present Congress received at the hands of the legislature a unanimous election, which, being interpreted, means that after a fierce campaign the whole contest had been absolutely settled in the direct primaries, so that the legal election by the legislature had become as perfunctory and mechanical an affair as the voting of presidential electors. Side by side, therefore, with Pinckney's statement that the election of a senator by the people of South Carolina was totally impracticable, should be placed the history of

the last senatorial election in that State as recorded by Senator Latimer, who declares that he "was elected to the United States Senate by 17,700 majority over J. G. Evans, and took his seat March 4, 1903."<sup>3</sup> So trifling an incident as his unanimous election by the legislature he does not deem of sufficient significance to deserve mention.

*2. Popular elections would secure to the States their equal representation in the Senate.* To the framers of the Constitution, nothing seemed more of the essence of federal government than that statehood should receive distinct recognition in the scheme of representation of the federal legislature. Accordingly, not only did they assign to each State two members in the Senate, but they provided that clause of the Constitution with stronger defenses than any other, by making it impossible of amendment except with the consent of the individual State.<sup>4</sup> The reasons for this insistence are obvious. Not only is the State entitled to its full representation, in order that its peculiar interests may receive proper consideration, but, of more importance, the national interests can be subserved only when all the members of the Union are duly represented. If any State's quota is incomplete, or if its voice in the Senate is entirely silent, the gravest of consequences may ensue, for it is one of the inevitable elements of weakness in a federal system that the individual commonwealths can serve as separate centers of discontent and resistance. In any session of Congress, action of the utmost importance to the country at large may be lost

<sup>3</sup> *Congressional Directory*, Fifty-eighth Congress, third session, p. 110.

<sup>4</sup> *Constitution*, Art. V.

through the chance vacancies in the quota of an individual State. Not only ordinary legislation, but the ratification of some treaty might hinge upon this point alone. But, that the placing of the election of senators in the hands of the legislatures does serve to thwart the intent of the framers of the Constitution, and to multiply vacancies with their attendant perils, can hardly be denied.<sup>5</sup> During the past fifteen years, in fourteen contests in ten different States, the body charged with the duty of electing senators proved powerless to perform its office; four States have undergone the cost and inconvenience of a special session of the legislature for the sole purpose of filling vacancies thus caused; six States accepted vacancies, and thus, by this antique election process, were effectually deprived of their equal suffrage in the Senate. Indeed, of the last seven Congresses, only one has been free from vacancies of this origin, and in the Fifty-sixth Congress there were four such vacant seats. It is true that certain amendments of the Act of 1866 have been proposed,<sup>6</sup> which would prevent such vacancies, while still leaving the election in the hands of the legislatures, but if these suggested remedies are to be judged by the results which they would have produced, had they been applied at the time when they were proposed, it would seemingly be better to put up with our present ills than to submit to such perilous remedies. So, it is contended, the prompt and effective preventive for this failure of that equal<sup>7</sup> suf-

<sup>5</sup> *Supra*, pp. 59-63.

<sup>6</sup> *Infra*, pp. 240-243.

<sup>7</sup> Whether, in other respects, popular election of senators would tend to undermine the equality of representation in the Senate, is discussed elsewhere, *infra*, pp. 230, 231.

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frage in the Senate which the fathers intended and were at such pains to secure, is the election of senators by the direct vote of the people. With the loss of no time, with no stubborn deadlock to incite all manner of corrupt practices, the choice of the voters, it is said, would be forthwith determined, and a vacancy in the Senate, because of some fault of the electoral machinery, would then become as rare, and of as short duration, as a vacant governorship.\*

3. *Nor would the popular election of senators involve the loss of representation of the States as such.* The fear has been expressed by some of America's foremost statesmen (Senators Edmunds and Hoar) that, although popular elections would secure to each State without delay its full quota of representation in the Senate, this reform would be secured at too great cost, because, as they believed, the senator chosen by the vote of the people would feel himself to be merely the choice of so many thousands of voters, rather than the representative of a great State. That there is importance in this idea of guaranteeing representation to statehood is not questioned, even by the advocate of popular election. It is essential that the Senate serve as a check upon radical democracy, and that the representation of States as such be interposed to the threatened advance of centralization which would menace local self-government. But, in the first place, it may be said that it is easy to overestimate the degree of representation of the States, as such, which is now either desirable or possible. More than a century of history lies between the

\*The gain which this would bring to the individual State is considered elsewhere, *infra*, p. 195.

First and the Fifty-ninth Congress. During that period, nationalizing forces have been vigorously at work transforming the people of loosely federated and almost alien States into the citizens of one great federal state, with a national consciousness and national aspirations. The first senators may have played the part of state ambassadors with dignity and self-respect, but to-day that rôle in the Senate is out-of-date, though some of its stage-business, especially the "courtesy of the Senate," still survives to vex us.

But, granting everything that can reasonably be asserted as to the importance of securing in the senator a representative of the State as such, the question yet remains whether that *desideratum* would be seriously imperiled if he were to be chosen by the people. This argument rests upon the assumption that through the legislature alone can the State speak in designating the senator of her choice, and in heartening him to the high task of her service. Many, however, believe that that assumption is groundless. In the proclamation of the governor, in the decree of the court, the voice of the commonwealth speaks no less truly than in the act of the legislature. They are all agents of the same body politic. Did Senator LaFollette feel himself less the representative of Wisconsin when he assumed the governorship as the choice of the people than when, a few months later, in the senatorial contest he came forth victor from the fierce fight of factions in the legislature? At a time when, more and more throughout the country, the characteristic work for which legislatures are chosen is being taken from them, on the ground that they do not listen to the State's voice nor heed her known

wishes, what shall be said of the claim that only through these legislatures can the State make the right choice of the men who shall be her worthy champions in the Senate?

4. *Nor would popular election interfere with those good qualities which have contributed to the Senate's past prestige and success.* The position which the Senate has held in our government has been one of even greater dignity and power than many of the framers of the Constitution anticipated.<sup>9</sup> The Senate has been the defender of freedom of discussion against the rule-ridden House; it has often exercised a salutary restraining influence, and when passion has swept everything before it in the House, the Senate has kept its head better; it has been the forum of our noblest oratory, the goal of our ablest statesmen. The Senate has been all this. At the present moment, the question need not be raised whether, in recent years, the Senate has held up to its high repute. Be that as it may, the point made by those who favor a change is that all these good qualities find adequate source or explanation in causes entirely distinct from the mode of election. Many of the most salutary traditions of the Senate grew up while it was a very small body, and even now the mere fact that it numbers but ninety members, in comparison with the 386 of the House, makes possible a stateliness in debate, a courtly deference to the wishes of colleagues, a freedom and fullness of discussion which are absolutely out of the question in the House, if the public business is to go forward. Again, the long term

<sup>9</sup> H. J. Ford, *The Rise and Growth of American Politics*, pp. 257-259.

of office, and the gradual renewal, are both influences of great weight in contributing to the Senate's efficiency, conservatism and self-control. The Congressman's term is so short that he hardly has a chance to learn the rules before it is at an end; but in six years, the senator has ample opportunity to acquaint himself with the duties of his office, and to establish working relations with his colleagues; while the fact that, in each Congress, the new senators find themselves far outnumbered by those who are already imbued with all the traditions of the chamber, brings the Senate into shape much more rapidly than the House, whose entire membership has been exposed to the chances of a popular election and a very large proportion of whose members may, therefore, be entirely new to congressional work. To the Fifty-ninth Congress there came only 11 senators who have not seen previous service in that chamber; and, of these, 6 had been members of the lower branch. In the House, on the other hand, 85 out of the 386 members are new men, a proportion which is usually much exceeded. Of the various causes, then, which have contributed to the success and prestige of the Senate, by far the most important—the small size of the body, its long term and gradual renewal—could not be affected by a change to popular election of senators.<sup>10</sup>

**B. POPULAR ELECTION WOULD IMPROVE THE TONE OF THE SENATE.**

- 1. *The Senate has deteriorated.* Various reasons have been cited which explain the success and prestige to which the Senate has attained. But, that its pres-

<sup>10</sup> *Infra*, pp. 219-220, 226.

tige has suffered no decline in recent years, few will have the hardihood to assert. We have ceased to rely with confidence upon the Senate for salutary conservatism: its measures are often quite as erratic, quite as partisan as those of the House. As a check upon heedless extravagance, it has repeatedly proved of no avail: it has been the Senate's amendments which have forced up the appropriations, particularly for objects upon which lavish expenditures were least justified. Within the last five years, too, more than once Thersites has shamelessly thrust himself forward in the debates of the Senate, and the Senate chamber has been disgraced by a fist-fight of its own members. Again and again, its much-vaunted freedom of discussion has been wantonly abused; important measures have been talked to death; and a single senator, in the words of Speaker Cannon, has held up Congress, until his demands were granted, or until he had fed fat the ancient grudge he bore.

Judged by the fruits which it has produced in recent years, in the estimation of the public, the Senate has fallen from its high estate. Its power remains; it even grows, but in large measure its eminence has been lost. In the very years when the United States is asserting her new mission as a world power, and when her motives need more than ever before to be free from all taint of commercialism, in the exercise of its power of passing upon treaties the Senate has allowed its decisions to be governed by the most sordid and most narrowly partisan considerations.

Never before in its history has the Senate been the target of such scathing criticism as during the past

fifteen years. On all sides is heard the charge that the Senate has ceased to be representative of the commonwealths or of the people of the United States; that, in its membership, statesmen are lamentably few, and are to-day becoming fewer; that the Senate has become a rich man's club, a paradise of millionaires; that it is now the stronghold of the trusts and of corporate interests; that through successive Congresses some of our greatest States continue to be represented by senators without a glimmering of statesmanship, men who owe their elevation to the arts of the ward politician; while, in other States, a seat in the Senate is made to serve as an old-age pension rather than as a call to high and effective service. In the study of the personnel of the Senate<sup>11</sup> the validity of these strictures has been examined. Doubtless, in many cases, charges have been brought against the Senate in the spirit of rank demagogery and with reckless disregard of proof; yet these accusations have found the minds of the people so filled with grave apprehension in regard to the Senate, that they were readily believed. When it is remembered that in the Senate of a single Congress—the Fifty-eighth—at least one out of every ten members had been put on trial before the courts or subjected to legislative investigation for serious crimes or for grave derelictions from official duty, and that, in every case, the accused senator either was found guilty or at least failed to purge himself thoroughly of the charges, there certainly is enough indication of low standards in the Senate to warrant the inquiry whether

<sup>11</sup> *Supra*, pp. 71-99.

the process by which the Senate is constituted is such as is calculated to select men of great ability and high character.

*2. Popular election would make the Senate responsible to the people.* Democracy is certainly a delusion unless it works out for itself a government which is, in some genuine fashion, responsible to the people. In the government mapped out by the Constitution, in the case of the judiciary, the responsibility is remote; the executive, in fact though not in form, passes under the judgment of the people every four years; as regards the House of Representatives, that branch of the national legislature is directly responsible. Not so the Senate.

Here the responsibility<sup>12</sup> is ineffective. Those who elect the senator know that, if he prove unworthy, blame for his misdeeds will not find its way back to them. The senator, on the other hand, knows that he cannot be recalled, and that those who placed him in office will not be in position to pass judgment upon him at the end of his term. Suppose that a senator were elected, for the first time, by the legislature of a given State early in January, 1906. In the ordinary course

<sup>12</sup> Various interesting analogies may be noted between the Senate and the House of Lords, upon which it was to a considerable extent consciously modeled. "It certainly exemplifies membership on some other ground than popular choice. Quay, and Hill, and Murphy are in their seats with as little relation to the wishes of any body of constituents as exists in the case of the Marquis of Ailesbury. What possible dependence upon popular suffrage or sentiment can be made out in Stewart or Jones? They sit for the Nevada Mining and Milling Company, just as the Duke of Westminster sits for his vast estates."—*New York Nation*, Vol. 57, p. 185 (Sept. 14, 1893).

of events, his active service will not begin until nearly a twelvemonth later. Before he has even taken his seat in the Senate, and years before the question becomes imminent whether he shall be returned, or shall be replaced by another, the body of men which elected him has been dissolved, never to meet again. In some States, five other legislatures may have intervened, and only a small remnant—and, it may be, no saving remnant—of the original legislature will survive in the one which is in session as the end of his term approaches, and thus be in position to pass a verdict upon his service. Examples of this may be found in recent elections: in Indiana, where the elections of the legislature are biennial, of the 148 members of the legislature of 1897, only six survived in the legislature of 1903, barely four per cent. Of the 280 members of the Massachusetts General Court which elected Senator Hoar in 1895, only seven survived in the General Court before which his name came in 1901 for reëlection. A responsibility can hardly be called effective which must be enforced by two and one-half per cent. of a constituency. It is simply impossible that a senator should feel himself under any strict responsibility to such a "kaleidoscopic constituency," neither the personnel nor the temper of which he can forecast. Almost inevitably it results that he renounces any attempt to keep in sensitive touch with the people. It is not to them that he standeth or falleth. He feels that he must put his political faith in some power that abides; and hence he turns to the "organization" and relies upon that to secure for him his reëlection as the reward for his subservience. The senator could hardly fail to feel much

more strongly his responsibility<sup>18</sup> for his legislative acts, if he knew that his chance of reëlection must depend not merely upon his becoming an adept in that branch of personal politics which will enable him to "negotiate" an election at the hands of the legislature, but rather upon his winning the approval of the people at the polls.

At present, however, there are frequent occasions when senators, not upon principle, but for personal reasons or for purely partisan advantage, give their assent, if not their advocacy, to measures which find no favor in their own States. The last Force Bill (1890) may be cited as an instance in point. Again, there are often issues which mean much to the development of the individual section or commonwealth, but which get little attention, since, as a matter of personal temperament or training, they do not appeal to an individual senator, or since they seem to him of doubtful expediency for the party. For example, in Massachusetts for a number of years there has been a strong and growing feeling that the best interests of the commonwealth imperatively demand more liberal trade relations with Canada. Whether that opinion is well grounded or not is not the present question: the point is that for years one of her senators seemed disposed to ignore the matter utterly, while the other was apparently doing his utmost to obstruct the movement in favor of any genuine reciprocity. A subservience to the people such as would detract from manly independ-

<sup>18</sup> Popular election would also secure the responsibility of senators to the people by giving to the people the final verdict upon senatorial candidates. *Infra*, p. 200.

~~ence~~ of thought and action is certainly not to be desired; ~~but~~ the knowledge that, in order to secure reelection at ~~the~~ hands of the people, the senator must at least give ~~to~~ their requests a candid and courteous hearing ~~which~~ would probably lead to some salutary searchings of ~~the~~ heart and of conscience, to see whether indifference, or purely personal interest, or narrow partisan expediency, has not led to negligence here, or lukewarmness there, or rancorous activity in the other place, when broadminded statesmanship would have called for an utterly different line of conduct.

3. *Senators, elected by popular vote, would have to be men who could command public confidence.* Democracy implies a real sharing on the part of the people in the decision of who shall hold and administer the offices. Unless this be set at naught by the boss, who wields the lash of "party loyalty," the man who aspired to a senatorship under popular elections would have to be one who had strong elements of personal popularity in his State, and one who could command public confidence. Of course, the expert wire-puller, the shrewd demagogue will be ever with us; but the successful candidate, nevertheless, would probably have to display a record, and give evidence of qualities of quite a different order, if he must secure his election at the hands of the people,<sup>14</sup> than if he must arrange to get it from a legislature of several parties and many factions. An earnest of the results which might be anticipated from popular elections is to be found in the fact that the majority of the men of most distinguished service in the Senate are those to whom the people had already

<sup>14</sup> *Supra*, pp. 57-59.

given an unequivocal vote of confidence by electing them to Congress or to high office in the state system.<sup>15</sup>

That some of the classes of senators who, in recent years, have done most to bring distrust and disrepute upon the Senate would be excluded by popular election may be asserted with a good deal of confidence. In the first place, the senator would probably be made more independent of the ring and of the boss. To a man of senatorial caliber, few thoughts can be more repugnant than that his opportunity to render the public service of which he feels himself capable, lies in the control of the boss or of the ring that can so manipulate the votes of the few "uncertain" members of the legislature as to secure a majority and the election for the man who in return will render the most abject service to his political masters. Imagine a Charles Sumner canvassing the chances of his reëlection with the head of the "organization" in his own State! Moreover, since in most States, the boss is the maker of senators, it is almost inevitable that he either takes the senatorship himself <sup>16</sup> or accords it to some one of his creatures who

<sup>15</sup> *Supra*, pp. 81-82; *infra*, pp. 219-220.

<sup>16</sup> "Thomas C. Platt has named himself for United States senator. In 1881, it might have been said with truth that a majority of the Republican members of the Legislature selected him as their candidate for senator, but in 1897 the process was reversed. Mr. Platt instructed the Republican senators and assemblymen to select him, and they obeyed his orders. There never has been in Albany a legislature more completely under the domination of a political machine.

"What has caused the change of conditions in the Legislature since 1881 has been the enormous increase of state patronage. In 1881, the State's expenditures were only a little more than \$6,000,000. . . . They have expanded until they have now

will do his will. It has been conservatively estimated that of the ninety members of the last Senate ten attained this high office mainly by reason of their proficiency in the arts of the ward politician.<sup>17</sup> The men of real statesmanship in the Senate, as a rule, are not the senators from the largest States, for there the most tempting array of loaves and fishes of federal patronage has led to the development of party organization under the most expert leadership, intent not upon the carrying into effect of principles, but upon the winning of the spoils. The list of senators from the most populous States in the last Congress affords abundant illustrations of this tendency; yet, men of the type of John Sherman and Cushman K. Davis, despite long and distinguished service, have often found themselves bitterly humiliated by the measures to which they were forced to resort in order to secure a reëlection. Many a senator would count it his greatest good fortune if,

reached a total of \$21,000,000, and a large part of them is the salaries of officials.

"Mr. Platt gained control of the state patronage in 1895, at what seemed its extreme limit of expansion, but the State Excise Department has since been created. For two years, he has had practically the naming of the heads of all the state departments. It is not surprising, from a politician's point of view, that Mr. Platt, with this gigantic patronage at his command, should have been able to name most of the Republican candidates for the Senate in 1895 and an exceedingly large proportion of the assemblymen in 1896. When the Republican senators and assemblymen gathered in the assembly chamber to-night, it was known to everybody present that Mr. Platt would be nominated for senator."—*New York Tribune*, January 15, 1897. His election followed, January 19, as a matter of course, all Republicans voting for him. *Infra*, p. 203, n. 32.

<sup>17</sup> *Supra*, p. 96.

once for all, he could be rid of these fettering relations of personal politics which bind him to the machine, and if he could appeal directly to the whole body of voters of his political faith in his commonwealth. Then, he would feel, he could make his calling and election sure by standing for those broad interests which speak straight to the public heart and conscience. His would be the independence that comes from the consciousness that the people look to the man, whereas the politician looks only to the party record. To many, it seems impossible not to find evidence of this inner conflict between the man's nobler instincts and his dread of the party lash, when they see what appears like irreconcilable inconsistency between many a senator's speeches and his votes. The former often voice his deepest convictions; in the latter he "bows down himself in the house of Rimmon."

Popular election, it may also be contended with force, would lessen the influence of wealth upon the Senate. Gouverneur Morris insisted that the Senate ought to be composed of rich men, and that its members should be paid no salaries, in order that that result might not fail to be brought about. He did not carry his point; salaries are paid; yet, were Morris alive to-day, he would have little cause to grumble at the average wealth of the senators. "The Senate," says Mr. Bryce, "now contains many men of great wealth. Some, an increasing number, are senators because they are rich; a few are rich because they are senators."<sup>18</sup>

<sup>18</sup> The extent to which men of great wealth have entered the Senate in recent years has been discussed in another connection. *Supra*, pp. 87-89, 95.

In the first place, it is to be expected that under popular election there would be sent to the Senate fewer "merely rich men"—men whose entire past has been devoted to wealth-getting or wealth-spending, and who have given no hint of any aspirations or aptitudes for statesmanship. That many men of great wealth should be members of the United States Senate is not of itself a thing to be deplored. But it does become an inconsistency, dangerous to democracy, if members of the dominant branch of the legislature come to their positions solely because of their wealth—if millionaires seek a senatorship with no serious thought of, it may be with no capacity for, service, but simply as a means of gratifying their families' social ambition—men who wear a senatorship as some decoration granted them by a state legislature at the behest of the boss in recognition of their having piled up millions in mining copper or selling oil or watering gas stock. Much of the prejudice is ill-founded, yet it is not without significance that, in the language of the street, the Senate is so often spoken of as the "millionaires' club," while, even in Congressional debates, the proverb in the revised version runs: "It is harder for a poor man to enter the United States Senate than for a rich man to enter Heaven."

Thus far, the discussion has turned upon the question whether men whose sole title to eminence is their possession of wealth are more likely to secure an election to the Senate at the hands of the state legislature than of the people. A further consideration has been noted. To the extent that the Senate comes to be looked upon as a rich man's club, or as a means

of attaining social eminence for one's self or for one's family, or as a means of wielding power for other than public interests, in like measure, men whose characters are susceptible to these motives are more and more tempted not to rely upon chance to bring them the prize, but to load the dice in their own favor. Experience in business, it may be in society as well, has made them believers in the doctrine that every man has his price. What then is more natural than that many a man of wealth should regard the senate chamber as a place to be entered by the one who stands ready to pay the charge of admission. No question is raised at present as to the damage done in the corrupting of state legislatures, but as to the lowering of the tone of the Senate by the admission of corruptionists to its membership. It is true that the Senate is the judge of the qualifications and elections of its own members, but it has construed this power very narrowly, and in its investigations of alleged bribery has shown little inclination to go behind the votes actually cast in the legislature.<sup>19</sup> Even when a senator resigns promptly upon the report of a committee to the effect that it deems the \$115,000 (which is acknowledged to have been spent by agents in his interest) an excessive campaign expenditure with presumption of the candidate's privity, the very next year he is reëlected with acclaim by the legislature of his State, and reënters the Senate as without spot or blemish. A few years ago, in California,

<sup>19</sup> For a brief summary of the cases in which the charge of bribery has been investigated in connection with Senate elections, and for the precedents as to the restriction of the field of investigation, see *supra*, pp. 50-59.

the bearer of an honored name admitted having placed \$19,000 in the hands of an agent for the purpose of carrying elections to the legislature before which he forthwith became a candidate for election to the United States Senate. To him, as he asserted, the expenditure seemed legitimate. For fifteen years, Delaware has been "held up" by an immigrant millionaire who declares that nothing but death can put an end to his efforts to capture a seat in the Senate. Now, it may, indeed, be true, as their apologists urge, that such aspirants as these are men of extraordinary ability; they may be of distinguished families, men of great cultivation, art connoisseurs of international repute, men of princely benevolence,<sup>20</sup> etc., *ad infinitum*. But, in the thought of every right-minded man, all these considerations are by the mark; for the very motives and methods of these candidates in seeking election to the Senate,

<sup>20</sup> "On all sides we hear the justification of the practices of this school by its deeds of charity. A few years ago we heard it in the very Senate of the United States, when Senator Henry B. Payne of Ohio, under the shadow of the charge that his seat was bought by the money of the Standard Oil Company, made, in substance, the defense that the Standard Oil Company could not have bought his seat, because, a few years before, no institution, no association, 'no combination in my district did more to bring about my defeat and went to so large an expense in money to accomplish it'—and, having thus accused the company of using money in politics, practically justified them for whatever they might do by pleading: 'they are very liberal in their philanthropic contributions to charities and benevolent works, and I venture the assertion that two gentlemen in that company have donated more money for philanthropic and benevolent purposes than all the Republican members of the Senate put together.'”—Ida M. Tarbell, "Character Study of John D. Rockefeller," in *McClure's Magazine*, Vol. 25, p. 396 (August, 1905).

disqualify them for service in that body. And it is a growing belief that, in state legislatures, they find a far more congenial field for their unscrupulous operations than would be found in the body of the voters at a popular election.

Moreover, it also seems probable, that popular election would tend to lessen the influence of corporate wealth in the Senate. "A few are rich because they are senators." It must be confessed that in our whole system of government, federal, state and local, there are few positions which offer richer "pickings" than a senatorship, if the senator be a man who is inclined to make gain out of his office. A single vote in that body may carry immense weight. Legislation is constantly affecting the interests of the masses at more and more points, and the result is that the success or failure of colossal business ventures may hinge upon inconspicuous bits of legislation, which to the uninitiated seem innocent or to the last degree trivial.<sup>21</sup> When senatorial elections are approaching, corporations become Argus-eyed, and the candidates who seem likely to do them service often get powerful backing. It is thought to be no mere coincidence that New Jersey, the "Mother of Trusts," and New York, where the leaders of high finance reside, have for years been represented in the

<sup>21</sup> Thus, the casual reader of the Dingley tariff bill was reassured to find in its free list "coal, anthracite, not specifically provided for in this act," but, in the pinch of the coal famine, caused by the strike of 1902, for the first time he discovered that the mention of anthracite in the free list had been little else than farcical, since the technical restriction of the term in that bill to coal containing at least ninety-two per cent. of free carbon, left the great bulk of the coal that could be purchased outside of this country still subject to a tax of sixty-seven cents a ton.

Senate by men holding presidencies and other positions of highest responsibility in corporations of the very type which it is becoming increasingly evident must be subjected to some form of effective control in the interests of the public. A list of the directorates<sup>22</sup> in public service corporations held by the senators from the half-dozen wealthiest States, would be a long one, and of great significance. In one of the North Pacific States, a few years ago, a subsidized continental railway company without any serious shock of surprise presently discovered both members of the firm of its late attorneys in the United States Senate.<sup>23</sup>

Moreover, many a man who has entered the Senate with clean hands and high ideals, has found the temptations which beset him desperately hard to resist. A change, ever so slight as it may seem to the public, in some law affecting the tariff, or railways, or banking, or shipping, or river and harbor improvements, means millions of gain to the corporations concerned, and their lobbies are persistent and insidious. Fortunately, the occurrence was not typical, but it was significant, that a senator of the United States should be found to be speculating in sugar stock at the very time when the sugar schedule of the tariff was in senate committee; and that he should declare that he saw no impropriety in such action. It was Mr. Havemeyer, the head of

<sup>22</sup> "Senator Chauncey M. Depew is more the agent or attorney of financial powers than a financial power himself; but, since he holds seventy-four directorships, he may be taken as a representative of corporations."—*World's Work*, Vol. 10, p. 6707 (Oct., 1905).

<sup>23</sup> Mr. Lincoln Steffens has given pointed illustrations of the assignment of senatorships in Wisconsin by the "System." *McClure's Magazine*, Vol. 23, pp. 566-9.

the Sugar Trust, who testified before a congressional committee that the American Sugar Refining Company contributed in some States to the campaign fund of the Republican party, in other States to that of the Democratic party, the intention being, apparently, to secure everywhere a friend at court.<sup>24</sup> And the interests of the corporation may be subserved, not only by electing the man of its special preference. To defeat a particularly obnoxious candidate may serve nearly as well; or, as a last resort, it may seem the best tactics for the corporation to play for a vacancy in the Senate. The stupendous growth in recent years attained by the trusts which in one way or another have profited from special legislation, has raised in the minds of many the question whether what is now most needed in the Senate be not, as some of the framers of the Constitution declared—a protection of the commercial interest against the agrarian—but rather a protection of the public against the grasping few, who now find in the Senate, and particularly in the legislative election of senators, tools well fitted to their hands.

The people may have put their faith for the moment in many a plan for gaining some control of the trusts which would have proved utterly futile, but certain it is that a senatorial candidate who was recognized as the choice of powerful corporations, or whose career, whether in politics or in business, had given evidence of close affiliations with such concerns, would stand slight chance of being elected by the vote of the people.<sup>25</sup>

<sup>24</sup> *Report of the Industrial Commission*, Vol. 1, p. 129.

<sup>25</sup> For an account of the election of a man who would have proved an impossible candidate for a direct vote by the people, see p. 57.

If by any chance such an agent of corporate wealth did secure an election, the people would pass their judgment upon him at the end of his first term. But to the members of the state legislature, on the other hand, the railroad president, the mine owner, or the corporation lawyer, as a senatorial candidate is by no means *persona non grata*. They have been brought into intimate relations with him before, and the same influences which secured from the legislature a charter or a franchise for a great corporation may be utilized to secure for it also a representative in the United States Senate. It is the testimony of those who have studied the Senate at close range that not a few of its members owe their presence there chiefly to the fact that they were the candidates who proved particularly acceptable to great corporate interests.<sup>26</sup>

<sup>26</sup> *Supra*, p. 95.

## CHAPTER VIII

### THE ARGUMENT FOR POPULAR ELECTION OF SENATORS (*Continued*)

#### C. POPULAR ELECTION OF SENATORS WOULD BE OF ADVANTAGE TO THE STATE AND LOCAL GOVERNMENTS.

1. *It would tend to divorce national from state and local politics.* Democracy stands its best chance of success, when the issues submitted to the decision of the people are simple, clear and distinct. In proportion as they are made involved or contradictory, the results must be unsatisfactory. Now, no other cause, it must be conceded, has led so directly, so inevitably, to the subordination, or rather the submergence, of state and local by national politics as has the election of senators by the state legislatures. Indeed, the distant approach of a senatorial contest may dominate interest in all other issues, even in a presidential campaign, as in Connecticut and Delaware, in the autumn of 1904.<sup>1</sup>

To the States are reserved enormous powers. As regards other than international relations, they are practically self-governing communities, although they derive immense advantage from their federal association. Yet, the spell which the national party casts upon the average voter is so strong that he rarely recognizes

<sup>1</sup> *Supra*, p. 69.

that, under all ordinary circumstances, it is by the near-at-hand state government that his life, his liberty and his pursuit of happiness are far more essentially affected. It is under the state law that his birth is registered, his education acquired, his marriage given validity, his business transacted and his property devised; and it is under state law that the heavier demands are made upon him in the way of taxes. It is of the utmost concern to him that these interests receive candid and painstaking consideration by a legislature as free as possible from every distracting influence. Hence, it would seem natural that policies should be framed and parties formed, within the individual States, according to the particular interests which, at a given time, are there demanding attention. That this has not been the case, that, on the contrary, with but a few rare and fleeting exceptions, state politics has been entirely submerged by national politics is due, probably, more than to anything else, to the linking together of the two in the election of senators. The prize of a seat in the Senate is so great that the party cannot afford to neglect any step which may lead to its attainment. Moreover, those self-chosen leaders "whose only business is politics, and whose only politics is business," never for one moment forget that the control of federal patronage—and that means of almost all the really delectable loaves and fishes—rests with the Senate.<sup>2</sup>

<sup>2</sup> In recent years, the control possessed and actively exercised by the Senate over office-filling has received striking acknowledgment and illustration. At the beginning of his first term, President McKinley gave it to be distinctly understood that he should be guided by the recommendations of the senators from a given State in making appointments of its citizens. In a letter

That the election of senators would come to be the function of cardinal importance in the state legislatures, was prophesied in the Pennsylvania convention of 1788 by John Smilie, speaking for the minority in opposition to the ratification of the Constitution. Said he: "The state legislatures will degenerate into a mere name, or at most settle into a formal board of electors, periodically assembled to exhibit the servile farce of filling up the federal representation." While the subjection of the legislatures, and their distraction from the interests of the State, have not reached the point here foretold, the divorce of national from state and local politics would produce many and distinct benefits.

(a) *It would promote the reform of representation in state legislatures.* It is hard to realize how far-reaching would be the effects of a change which would make the party complexion of the state legislature a matter of no moment. The whole procedure which leads up to the constituting of the legislature would be transformed. Thus, in several of the States, the determination on the part of the party in power to perpetuate, as

to a congressman, who had been outspoken in asserting that he ought to be allowed to choose the postmaster in his home city. President Roosevelt wrote: "To clear up any possible misapprehension, I would like, at the outset, to say that senators do not "select" postmasters in any State while I am President. I consult them always, and, in the vast majority of cases, act upon the recommendations they make" (October 28, 1904). At the very end of a recent session the Senate delayed its final adjournment an hour at the instance of a western senator, in order that he might secure from the President the nomination of an adherent of his faction as district-attorney,—a nomination which, it was believed, the President had refrained from making because of objections urged by the senator-elect from the same State.—*Boston Herald*, March 20, 1905.

far as possible, a fortuitous party advantage, has led to the retention of features in the system of representation which would speedily disappear, if the question, stripped of all admixture of national politics, were simply: how may the best representation of this State be secured? As a single illustration, Connecticut's rotten borough system is bolstered up by nothing so much as by the fact that the dominance of the old hill towns, in the lower house of the legislature, assures the State's two seats in the Senate to the Republican party, with little regard to the vote which the people may cast for a Democratic governor or President.<sup>8</sup>

Popular election of senators would also remove the temptation to gerrymander the State with the object

<sup>8</sup> *Supra*, p. 65. By the Constitution of Connecticut, any town which, in 1818, was entitled to two representatives retains that number, while no town or city may have more than two. The results are startling. The population in half a dozen Connecticut cities and towns has changed as follows during the last two census decades:

	1880.	1890.	1900.
Hartford.....	42,551	53,230	79,850
New Haven.....	62,882	86,045	108,027
Bridgeport.....	29,148	48,866	70,996
Hartland.....	643	565	592
Hebron.....	1,243	1,039	1,016
Union.....	539	431	428

In New Haven, in the election of the legislature in 1902, over 18,000 voted; in Union, the number of those who cast ballots at that election was eighty-one. Yet, in the legislature, these six communities have precisely the same number of representatives. No agitation to correct this unfairness has proved of any avail, though vigorously urged by one of the ablest of recent governors. An amendment to the Constitution a few years ago brought about reform in the representation in the Senate, where, however, it was much less needed.

of securing party advantage in the United States Senate; for, aside from its effect upon that election, the distribution of party strength in the legislature would be a matter of slight concern. This weighting of the scales, this loading of the dice, has come to be practiced widely and almost as a matter of course; yet, it inevitably lowers the tone of the party which yields to such temptation, and of the legislative body whose personnel it affects.

(b) *It would promote the nomination and election of members of the legislature upon the simple issue of their fitness for such service.* Such is the force of habit, that candidates for the legislature would doubtless still continue to be called by party names; but those who select the candidates, whatever the process of nomination, would have to face this situation: these candidates must now go before the people to be judged upon their merits as State legislators, not as counters in the game of federal lawmaking or office-winning.<sup>4</sup>

\*The injurious effects of the present method of electing senators upon the States have been thus summarized by a recent writer: "This election of senators by the state legislatures has insured the subordination of state to federal politics; maintained party divisions that were natural in the national field in a field (municipal as well as state) where they were uncalled for and mischievous; made the 'final end' of a legislature not the proper affairs of the State, but the election of state senators in the interest of national party supremacy; constrained the conscience of men to vote for unworthy candidates for the legislature lest the party at Washington should be imperiled; and, in a word, prepared the way for the absolute domination of the machine as we see it to-day, in Pennsylvania, for a flagrant example, where the aspiring senator creates his own legislature, not merely for his own election, but for an instrument of local plunder and patronage in absolute subserviency to his assent to every species of

Under present conditions, coming senatorial elections certainly do cast their shadows before,<sup>5</sup> and beneath those shadows, the qualifications of candidates, and the relative importance of issues, get sadly obscured. The name of many a candidate for the legislature, now put forward with brazen assurance, would never be heard of, when questions as to his qualifications, for rendering efficient service as a lawmaker for the State, could no longer be drowned by the beating of the party drum.

Moreover, to the conscientious voter, as he comes to the polls, the simplification of his task would come as a welcome boon. He intends to do what is right, according to his lights—otherwise our faith in democracy is vain and we are yet, and are likely long to remain, in our sins. But, the disquieting fact is, that often when he comes to the polls, he finds the issues sadly blurred, and his duty by no means clear. Frequently, he is made to face a most embarrassing dilemma: he must choose whether he will express his real convictions upon national or upon state issues. And, not only must he do this, but, in voting upon the issue to which he thus gives the preference, he may be obliged to stultify himself as to the other.<sup>6</sup> Or, the

enactments. . . . We are persuaded that nothing has contributed so powerfully and so inevitably to the debasement of these bodies as the principle imbedded in the Constitution, which is now being assailed. The contrivance has not only not worked as the founders intended, it has worked in the opposite way."—*New York Nation*, March 20, 1902.

<sup>5</sup> *Supra*, p. 40.

<sup>6</sup> John Haynes, "Popular Election of Senators," in *Johns Hopkins University Studies in Historical and Political Science*, eleventh series, Nov.-Dec., 1893, gives a telling illustration of this dilemma as it faced Iowa voters in 1891.

voter may find himself fronted by a dilemma in which the character of the candidates is an important factor. But let the perplexed voter speak for himself. In comment upon an editorial which declared: "If the people bore in mind, in voting for the members of the legislature, that they were thus voting by cumulative proxy for United States senators, perhaps they would send better men to the state capitals, and thus get in turn better senators," a New Jersey voter wrote:

"There is another way to look at it—the way it appeared to me at the last election. The machine had nominated a member for the legislature whom I would have liked to vote against, preferring a Democratic candidate, as in every way a better man, as far as strictly state legislation was concerned. But, thought I, my vote for this Democrat may elect him, and his election may make the legislature in joint session Democratic and will insure the election of a Democratic United States senator, a danger to be averted at all hazards. Here the voter had the choice of two evils: (1) To send the less fit of two men to the legislature, and (2) to send the better man to the legislature who would vote for the wrong man for the Senate. As a protectionist and a supporter of the administration, I chose the first evil. Popular election of senators would solve this difficulty."<sup>1</sup>

At yet another point, this blurring of the issue confounds the voter. There is much talk about the legislator's "responsibility to the people"; yet this responsibility can hardly be enforced except when the legislator comes up for reelection, and then, the voter is likely to be charitable. He wants to run no untoward risk of giving aid to the opposing party; hence, he lets

<sup>1</sup> Letter of William Kent to the *New York Tribune*, May 5, 1899.

the legislator's record of party loyalty cover a multitude of his sins of omission and of commission in the service of the State.

(c) *It would improve the state legislatures.* The gravest evils of our state governments gather about, not the executive nor the judiciary, but the legislature. During the past generation, few changes in public sentiment have been more pronounced and more significant than the people's growing distrust of their lawmakers. From one end of the country to the other, this distrust has been evidenced, not only in sharp condemnation of legislative acts, but in the disposition to confine the work of legislatures within the narrowest limits, and to strip them of power to act in matters which vitally affect the people.

If the election of senators were placed directly in the hands of the people, it would certainly help to give the States better legislatures; not simply because the issues would be clarified in the nomination and in the election of members, but because one of the ulterior motives which lead politicians of the baser sort to seek an election would be taken away. "Wheresoever the carcass is, there will the eagles be gathered together." Now, while it is true that in the spoils of corporations are found the most tempting baits for the unprincipled legislator, the suspicion is certainly prevalent that, in not a few States, at various times, members of the legislature have found that their votes for senator had an exchange value—if not for money, at any rate for dainty morsels of federal patronage. Not only, moreover, does this election directly tend to make the legislature corrupt by serving as a lure to unworthy candi-

dates; it also increases the likelihood of corruption by narrowing the field upon which the briber need bring his malign influences to bear. In a legislature of 150 members, where parties are nearly evenly balanced, the election requires but a bare majority, and the real election is often determined in the legislative caucus of the majority party. In that caucus, and in the later election, the whole result may easily hinge upon the corruptibility of one or two men.

(d) *Popular election of senators would leave legislatures free to do their normal work.*<sup>8</sup> In the first place, it would rid them of a task for which they are ill fitted. The conditions which govern the election of state legislatures—conditions, as has just been noted, which are greatly complicated by the anticipation of a senatorial election—preclude the legislature's making the election in the spirit, and with the canons of choice, anticipated by the framers of the Constitution. The electoral college in the election of President, we keep, not because it works as it was planned that it should, but precisely because it does *not* so work; because, in reality, it approximates a popular election, without causing complications in the rest of the governmental machinery, inasmuch as members of the electoral college serve for that purpose alone. But, upon the state legislatures, with heavy burdens in their own legitimate work, there is imposed this function, which no straining of logic can construe as a legitimate legislative function. Indeed, the Constitution itself, in another connection, gives clear recognition to this inconsistency, for it specifically disqualifies members

<sup>8</sup> *Supra*, pp. 149-151; *infra*, pp. 240-243.

of the federal legislature from serving as electors of the President, while insisting that members of the state legislatures must be the electors of senators.

To the legislator, moreover, as to the voter who elects him, the path of duty is often befogged by the blurring of state and national issues. He can never lose sight of the fact that a chief, it may be *the* chief, consideration which led to his election was the reliance placed upon him to do his party service in voting for its candidate for the Senate; and, in consequence of this dominating task, almost every question before the legislature comes to take on a party color, as foreign to it in essence as could well be imagined. In considering a proposed piece of legislation affecting business law, inheritance, taxation or education, he is constrained to vote for or against it, not according to his candid judgment of its real merits but according to a forecast, not his own, of the amount of capital that can be made out of it for the party, or for the ring.

Yet, it is not only his party allegiance which fetters and distracts him; still more galling are apt to be his bonds to the boss.<sup>9</sup> For reasons already discussed,<sup>10</sup> the tendency is strong for the expert manipulator of legislative majorities to elect himself to the Senate.

<sup>9</sup> Brazen presumptuousness can hardly be carried further than in the language alleged to have been used by J. Edward Addicks, the day of the election of Allee and Ball, March 2, 1903: "With Mr. Allee in the Senate, we will be able to get rid of all the traitors in the camp, such as postmasters throughout the State, and fill their places with our own men. We will also get rid of all the bolters, and two years from now, in full control of the State, I will elect a legislature which will send me to the United States Senate."—*Associated Press* dispatches.

<sup>10</sup> *Supra*, p. 169-170.

Forthwith, through his control of federal patronage, although in a sense the creature of the legislators who elected him, he becomes their master. Ready illustration is found in the grip which Hanna, and Platt, and Quay have held upon their respective legislatures. The legislator must now take into consideration the personal end and advantage of the boss, and *he* it is, who now comes to determine what legislation shall be killed and what shall be "jammed through." The new member soon learns the length of his tether, and his plaint is often pitiful. In 1897, when a senatorial election was pending in New York, a member of the assembly stated his dilemma thus:

"I am uncertain what to do. I have various important measures which I desire to introduce in the assembly, and if I do not vote for Platt, none of them will be allowed to go through. You have no idea of the pressure which has been brought to bear upon me to vote for Platt, and I am not sure that it is the part of wisdom for me to refuse to support him."<sup>11</sup>

<sup>11</sup> *Boston Herald*, January 14, 1897.

How inappropriate is the task of electing senators, how it blurs all issues before the legislature and subjects the legislator to the tyranny of the boss—all these points are well enforced in the inaugural address of Governor Voorhees before the New Jersey Legislature:

"The plain truth is, reluctant as one may be to admit it, that from many of the States there have been sent to the United States Senate men who have been unfit and who would never have appeared as candidates for that high office had they been compelled to face the ordeal of a popular election. The State has frequently been deprived of the services of its best and most distinguished statesmen and in their place have been sent men who were destitute of every appropriate qualification.

"None better know the embarrassments and trials that beset the

(e) *Popular election would prevent serious interference with state business.* The election of senators by state legislatures invariably causes distraction and confusion in the legislature's legitimate work—at times amounting only to temporary delay, at times utterly blocking all the state business and annihilating the legislature, so far as any service of the State is concerned.<sup>12</sup> Reference is not now made to the distortion of perspective, through which, because of the electing of senators, the legislator comes to see his other work; but simply to the physical monopolizing of the legislator's time and strength, the crowding out of normal work, while parties and factions fight the battle for partisan or personal advantage. If only his ambition could have attained the goal, what recked Addicks that a Delaware legislature in the year of grace 1901,

conscientious legislator when he is called on to make a choice than do you who, in the discharge of duties imposed on you by the Constitution, will soon name the successor to him, now dead, who so long and so faithfully represented us in the Senate of the United States. Without doubt, many of you, regarding the true interests of the State, are prompted to vote for another, rather than for him whom you feel obliged to favor for reasons which are personal or political, or, it may be, purely local in character. This fact, the truthfulness of which will be acknowledged by you all, though possibly not openly confessed, is, in itself, no slight condemnation of the present system, and furnishes one of many arguments that might be adduced for the change which is urged." January 14, 1902.

Perhaps the members of the legislature resented the plainness of the governor's language and his frank setting forth of the rival claims upon their allegiance. At any rate, his enthusiastic advocacy did not suffice to secure from them a resolution favoring popular elections.

<sup>12</sup> *Supra*, p. 68.

could find nothing more important upon which its warring factions would concur than to ratify the last three amendments of the Federal Constitution!<sup>13</sup> or to pass resolutions "that the thanks of the Senate and House of Representatives be extended to the various transportation companies doing business in this State for courtesies extended to the members thereof."<sup>14</sup>

The rancor and pertinacity of modern senatorial contests, undreamed of in 1787, seem to have been only dimly foreseen when the law of 1866 was enacted. The spokesman for that piece of legislation believed that "not once in a hundred years would any third party stand out . . . and thus prevent the ordinary legislation of the State."<sup>15</sup> Although the most impracticable feature of the bill—that which required that the balloting for senators continue "without interruption by other business"—was replaced by the mere requirement that at least one vote a day should be taken, the law still lends itself readily to the designs of the obstructionist, as many a State has learned to its sore cost, both in money and in the crowding out of legislation. Especially in States where the sessions are limited to forty, sixty or ninety days, the pressure which a small group can bring to bear in favor of its candidate, when parties are nearly evenly balanced, is well-nigh irresistible. Individual members may have measures in which they are deeply interested; business, fiscal or educational interests may be suffering for remedial legislation—so much the better for the astute player of the game. Let him but pursue a Fabian

<sup>13</sup> February 12, 1901.

<sup>14</sup> April 16, 1903.

<sup>15</sup> *Supra*, p. 28.

policy, and the reward of his delay shall be concession, wrung from those who see, close at hand, the fateful day of adjournment.

Practice in the game has also developed new tactics. In Oregon, the sessions of the legislature are biennial; and, according to the Constitution, neither house may organize unless two-thirds of its members are present. This makes it possible for one more than one-third of the members of either house to prevent the election of a United States senator. Oregon's most instructive experience was with the legislature which convened in January, 1897. Mr. Tongue, Oregon's representative, in a speech of May 11, 1898, thus describes its subsequent career:

"A little more than one-third of the members of the House declined to take the oath, declined to qualify, declined to enter upon the discharge of their duties, and the legislature was absolutely powerless. The Senate organized and was in session forty days (the full legal term of the legislature), incurring expenses and bills to be paid, but could pass not a single binding resolution. The House resolutely refused to organize because more than one-third of the members failed to qualify. The result has been no legislation, no United States senator, no appropriation bill, and so, while we are collecting taxes and piling up money in the treasury of Oregon, the bills against the State are paid by warrants drawing eight per cent. interest."<sup>15a</sup>

Observe that this is said a year and three months after the men, who had been elected to serve the State, had dispersed to their homes. They did not *adjourn*, for, as a legislature, they had never been in session.

<sup>15a</sup> *Congressional Record*, Vol. 31, p. 4819.

For the reason that rival aspirants for the Senate would not abate their claims, and that rival factions could not agree upon a division of the spoils, this handful of "legislators" "destroyed, extinguished the legislative function in a sovereign State. The senatorial election was a question so dominant and distinctive that the choice of senator prevented even an attempt at organization or normal legislation."<sup>16</sup>

What the *people* of Oregon thought of this fiasco at their expense is indicated by the resolution adopted in the very first weeks of the next legislature:<sup>17</sup>

"WHEREAS, 'When, in the course of human events,' any of our time-honored customs become burdensome or have outlived their usefulness, it behooves us, as representatives of the Commonwealth of Oregon, to advocate what we believe to be right and best for the whole people; and the time having arrived when the election of United States senators is, in any event, viewed with suspicion, and in many instances is proven to have been accomplished through unwarrantable means; therefore, be it

" Senator Turpie, February 3, 1897. It is interesting to observe that such a possibility was foreseen in 1866, and that an attempt was made to meet it. Senator Clark, the spokesman for the bill, introduced an amendment to the original draft, so that the section in question should read: "And if a vacancy shall happen during the session of the legislature, then, on the second Tuesday after the legislature *shall have been organized*, and shall have notice of the vacancy," etc. Mr. Trumbull: "I suggest . . . that that can hardly be necessary. This provision is, 'if a vacancy shall happen during the session of the legislature.' Is it a 'session' of the legislature until it is organized?" Mr. Clark: "It may be. *The legislature may be together and sitting, but not organized.* I want to avoid that difficulty." The amendment was agreed to. July 11, 1866.

<sup>16</sup> January 18, 1898.

*Resolved*, by the Assembly of the State of Oregon, That we are in favor of electing the United States senators by a direct vote of the people, as other servants are elected, and not otherwise. That we would respectfully ask our representatives in the national Congress to use all honorable means within their power to accomplish the same.”<sup>18</sup>

*2. Popular election would insure the States' being represented in the Senate.* In discussing the gains which popular election would bring to the Senate, emphasis has been laid upon the fact that it would put an end to the frequently recurring vacancies,<sup>19</sup> and that it would thus secure that equality of representation of the several States which the framers of the Constitution deemed to be the most essential feature of the upper branch of the federal legislature.<sup>20</sup> In the present connection, this prevention of vacancies by popular election must be looked at from a different standpoint. A vacant seat in the Senate means, to be sure, that the country's general interests are receiving a consideration by so much the less thoroughly representative than that which the fathers intended. Far more direct and disastrous, however, are the effects upon the individual State. Its peculiar and distinctive interests, as contrasted with those of the other States, are assured of but a single spokesman. In three recent Congresses, Delaware has had but one senator, while from 1901 to 1903 her voice in the Senate was as mute as if she had ceased to exist. By popular election of senators, the

<sup>18</sup> H. Joint Resolution, No. 2. <sup>19</sup> *Supra*, pp. 59-63, 158-160.

<sup>20</sup> *Constitution*, Art. V.

State would be delivered from the bondage of this death.<sup>21</sup>

3. *Popular election would prevent the worst evils of minority representation in the Senate.* Worse even than the loss of a voice in the Senate through the deadlock in the legislature, may be the minority representation, the positive misrepresentation, to which the present system of election conduces.<sup>22</sup> This may be a result, not originally intended, of the individual State's system of representation.<sup>23</sup> More often, it results from some factional struggle, which becomes exaggerated in the legislature, so that the group, however small, which holds the balance of power, can tire out the principal contestants and carry off the prize. For the tension of a deadlock, this is sometimes the easiest solution. Each of the larger factions finds consolation in the fact that its opponent also has lost in the fight. But to the State at large this brings small comfort, when it finds itself represented by a senator who can with no propriety be regarded as its normal representative. It is true that under popular elections the vote might be so scattered among the leaders of rival factions that the candidate of a minority party would win the prize. But such a man could present himself upon the floor of the Senate with dignity and self-respect. He would be not a coalition's toss-up candidate who served to break the deadlock, and whose "majority" is devoid of all logical import,

<sup>21</sup> Whether popular election would threaten the continuance of the equal suffrage of the States in certain other respects, is discussed elsewhere. *Infra*, pp. 229-231, 252-253.

<sup>22</sup> *Supra*, pp. 64-65.

<sup>23</sup> *Supra*, p. 74.

but the candidate for whom a straightforward and direct preference had been expressed by more voters than could be marshaled for any other man. Minority representation of this quality is more to be desired than the representation of a majority, attained only by coalition too often made possible only at the price of deals and bargains, which mortgage the senator's usefulness throughout his term.

4. *Popular election would elevate the tone of state and municipal politics.* The prospect of easily winning over enough members of the legislature to insure an election, often leads men to aspire to the senatorship who could never hope for success, if they had to go directly before the people. It would tend incalculably to the raising of the tone of political morality, if the freebooting campaigns of such political adventurers could be stopped. No self-respecting citizen can fail to feel himself humiliated when a political immigrant to his State issues the ukase: "The issue is not Roosevelt or Parker. It is Addicks or no Addicks—that is all there is to it."<sup>24</sup> Yet, no one can doubt that these words did state the dominant issue of the campaign in Delaware. The wretched pity is that the indirect process of electing senators prevents the people's seeing the naked issue, and enables the boss, by juggling with party names, to capture voters who pride themselves on their political orthodoxy to the discredit of their powers of discrimination; for orthodoxy and truth are not always of the same family.

Nor is the effect of this willful confusion of issues confined to the state system alone. We need no foreign

<sup>24</sup> Boston *Herald*, August 17, 1904.

critic to inform us that it is in municipal government that we have made our worst failures, and that the chief reason is that we have allowed national politics to be injected into our municipal campaigns and administration. In other words, here, too, we have allowed crafty politicians to whip us into line for the party nominee, when, in his cooler moments, every man knows that in the government of the city the mayor's views upon the tariff or the currency are as immaterial as are his views upon Wagner's music or theosophy. No one doubts that, in New York, Tammany and the Republican machine have repeatedly planned the campaign together upon the basis of a preliminary agreement as to the division of the spoils. In Philadelphia, for years, misrule has been securely intrenched, defended by as many thousand fraudulent Republican votes as any given exigency might demand.<sup>25</sup> Inasmuch as no other cause leads so directly to the overwhelming of local by national politics as does the election of senators by the state legislatures, the placing

<sup>25</sup> Indications in 1905 are encouraging the hope that this statement is becoming obsolete. Yet, so entirely has national politics come to overshadow state and local politics, that, in the midst of the almost hopeless corruption in Pennsylvania, one of the ablest men of the State could say: "We are ready for another Declaration of Independence. This does not mean that we take down our Republican flag and put up an independent flag. It is only the cacklers of the spacklers who say that to befog and mystify the unthinking. We must get out of a kitchen horizon and see large things through large hearts and clear eyes. I am a Republican of Republicans, and from my boyhood to this day I have never voted any other ticket. Neither have I scratched it, nor bolted it."—Speech of John Wanamaker, Lancaster, Pa., March 16, 1898, during the campaign for the election, not of congressmen, but of governor of the State.

of that election directly in the hands of the people could not fail to react favorably upon the government of our cities.

5. *Popular election would promote "home rule" in the States.* If senatorial elections were given over to the people, the States would be freed from not a little outside interference. At present, the election is closely watched from Washington. If party control in the Senate is wavering, and if the result in a given State is in doubt, then the Administration takes a hand in the game. Thus, a senator from Ohio and a member of the Cabinet from Wisconsin virtually issued orders to the members of the Colorado legislature to get together and elect some Colorado Republican—apparently it made little difference which one—"considering, above all else, the interests of the party."<sup>26</sup> Or, are the regular Republicans in Delaware, at the end of a long and heroic struggle, on the eve of seeing their little band rewarded by the Democrats agreeing to divide with them, or even yield them both senatorships, kept vacant for two years? Again the telegrams from Washington take on a dictatorial tone; Hanna and Payne meet in business session; the secretary of the Republican National Committee is sent posthaste to Dover; and the next day, "in the interests of harmony," the regular Republicans throw over their proposed agreement with the Democrats, and compromise with the Union Republicans on the basis that the long-term senatorship shall go to Addicks's lieutenant, while the short-term senatorship goes to his most bitter and pertinacious opponent. However much harmony of

<sup>26</sup> *Boston Herald*, January 18, 1903.

this sort may conduce to the success of the politicians' schemes, it is of evil omen for the afflicted State and for the country at large.<sup>27</sup> In 1787, the election of senators was considered of vital concern to the State; and it was put in the hands of the legislatures that thus they might have at their command a check upon the aggressions of the national government, and that the choice might with more certainty fall upon men of pre-eminent character and ability. In 1903, at the crack of the party whip, men, who have fought the good fight for weary months and years, throw up the struggle, and compromise with the very man to keep whom from power has been the sole object of all their striving.

6. *Popular election would give to the people the final verdict upon senatorial candidates.*<sup>28</sup> Those who oppose the election of senators by the direct vote argue with not a little force that the people's real share in the choice of their senators would be not a whit greater than it is at present, for the reason that the selection of candidates would be made in party convention, a body

<sup>27</sup> The attempt to dominate the Delaware election from outside is no new thing. In 1903 the conference was held in Dover, for experience had proved that there were limits to the demands which could be made upon state legislators:—"Four years ago the outstanding regulars were summoned to Philadelphia for a conference with the national party leaders, who were then, as now, solicitous when they were on the eve of a presidential campaign. Only a few of the regulars, however, made the journey. Two years ago the national leaders summoned the regulars to Washington, and only two or three attended."—*Boston Herald*, January 26, 1903.

<sup>28</sup> It has already been noted that, in other ways, the popular election would secure the responsibility of senators to the people. *Supra*, pp. 166, 186-187.

subject to few of the restraints which control a legislature, and more open to many bad influences than is the legislature. But when the advantages of choice by the legislature are compared with those of a popular election, predetermined by the party convention, it must be noted, in the first place, that the election by the legislature is by no means, as this argument would seem to imply, the bringing to light of the unconscious consensus of opinion of the members as to the merits of the candidates. Practically everywhere, the member votes in accordance with the nomination made in legislative party caucus—to which many of the objections urged against conventions apply—and whose dictates are enforced by all the pains and penalties known to party discipline. Hardly a year passes in which the election of a senator is not delayed until such time as the party caucus can come to an agreement in its choice among rival candidates. In Florida, in 1891, at an early session of the caucus, a resolution was unanimously adopted that a committee should be appointed so to divide the vote in the legislature as to prevent an election till the joint caucus had made a nomination; and eighty-six ballots were taken before the patience of the members was exhausted so that they broke from this agreement. This is but typical of experiences of frequent occurrence.<sup>29</sup>

Moreover, severe as are the denunciations of the choice of senators by irresponsible conventions, it has, till recently, been accepted, almost without protest or thought of change, as the normal American mode of selecting governors and Presidents. And, even our

<sup>29</sup> *Supra*, pp. 39-43.

state legislatures themselves are convention-made, for their members owe their seats to a choice made in the very method to which so many objections are urged. But, most important of all, the convention's act is not final; it is subject to review—it may be, to rejection—by the people. The convention may be composed of less responsible men than the legislature; it may be even more open to malign influences, and far less restrained in the conduct of its business; it may, through haste or ignorance, even through fraud and corruption, make a thoroughly bad nomination; *but* there yet remains the actual election by the people; and, between the convention's act and the people's verdict upon it, there intervenes a period of several weeks, during which the nomination is under review, and public opinion has time to form. In the legislature, on the other hand, everything hinges upon getting a majority, it may be, of but a single vote. Once the members of the legislature have been elected, the people's part in the electing of a senator is at an end. From that time on, they are merely spectators. A boss might find it far easier to capture a convention than a legislature, but the spoils of the victory would not be so well assured. The legislature could "deliver the goods"; the convention could, at most, only bring moral pressure upon the people to do so.<sup>80</sup>

<sup>80</sup> It would hardly be possible to "suppose" a case which would afford better illustration of the dangers involved in the possibility of crowding through a skillfully managed legislature the election of a thoroughly unrepresentative candidate than is to be found in the election of Henry B. Payne, who took his seat as senator from Ohio in 1885. Some features of this election are discussed elsewhere, p. 57. Its circumstances are presented in detail in

As a matter of fact, the whole question of the choice of senators by the convention in contrast with their choice by the legislature is being modified by the changes which recent years are bringing about in the nominating system. In many States, it has come to be seen that, inasmuch as party indorsement is often equivalent to an election, the same logic which demands that the State regulate elections, requires also that the caucus and the convention be conducted under State supervision; and, as a result, the legislature's action is now hardly more formal and more hedged about by rule and precedent than is that of the party convention. Moreover—and of far more importance—in the South and in the West the movement in favor of direct primaries has made great progress, and shows signs of advancing rather than of being retarded or turned back.<sup>31</sup> It appears, therefore, that this argument as to the superiority of legislative election to popular election, predetermined by a nomination in party convention, derives much of its force from assuming an elective process in the legislature which does not exist, and ignoring the recent significant changes and tendencies in the nominating system.<sup>32</sup>

senate reports, and are summarized clearly in G. S. Taft's *Compilation of Senate Election Cases*, edition of 1903.

<sup>31</sup> *Supra*, pp. 136-140.

<sup>32</sup> *Prophecy and Fulfillment*.—

"Through the medium of the state legislatures—which are select bodies of men, and which are to select the members of the national Senate—there is reason to expect that this branch will generally be composed with peculiar care and judgment."—Hamilton, in *The Federalist*, No. XXVII.

"Let it be remembered that it (the Senate) is to be created by the sovereignties of the several States; that is, by the persons

*7. The fact that popular election could be secured only by amending the Constitution is not a grave objection.* Not a little of the opposition to the movement for the popular election of senators comes from those who believe that the amending of the Constitution would be an act so pregnant with radicalism as to outweigh many if not all of the benefits which are sought

whom the people of each State shall judge to be the most worthy, and who, surely, will be religiously attentive to making a selection in which the interest and honor of their State will be so deeply concerned.”—John Dickinson, *Letters of Fabius*, No. II., in *The Federalist and Other Constitutional Papers*, edited by E. H. Scott, Vol. 2, p. 784.

“On January 14 (1897), the Republican members of the Legislature of New York met in caucus and selected their candidate to succeed Mr. D. B. Hill. The most eminently qualified man in the State of New York (the Hon. Joseph H. Choate) was duly presented to the caucus. No other names were presented or mentioned. There are 151 Republican members of the present state legislature. A vote was taken, and seven members were found to be in favor of Mr. Choate. All the rest, with a notable exhibition of spontaneity, declared themselves in favor of Thomas C. Platt. A few days later Mr. Platt was formally elected. His control of the legislature is more complete than his control of any office boy in his private employ; for the office boy, after all, is not owned by Mr. Platt, and could quit work if he did not find that the place suited him, but the legislature seems to be his, both soul and body.”—*Review of Reviews*, February, 1897.

In the Delaware contest of 1903, when the long deadlock was broken by the election of Ball and Allee—“The vote was received with cheers, and, as each name was called, the noise and confusion, the shouting and coaching of members by the friends and supporters of the various factions increased so that many of the legislators became bewildered, and apparently did not know how to vote. But whatever they may have said in the confusion no one could tell, and they were recorded as voting as it was intended they should.”—*Associated Press* dispatches, March 2, 1903.

by means of it. The people of our age and of our land are not too much characterized by reverence, and to the thoughtful man this protest is one which must have not a little weight.

Yet, it is to be remembered that the Constitution has already been repeatedly amended without impairing the veneration in which it is held by the people. Moreover, in amending their constitutions, the States have often found relief from evils which the legislatures were either unwilling or unable to remove. Nor, is it reasonably to be expected that a Constitution, framed more than a century ago, and in many of its provisions largely determined by the merely temporary conditions and prejudices of thirteen isolated and undeveloped commonwealths hesitatingly approaching the almost untried experiment of federal government should, without change, continue fully to meet the governmental needs of one of the most powerful and most rapidly developing states which history has known.<sup>38</sup>

<sup>38</sup> An Australian writer, Mr. Henry Bourne Higgins, comments as follows upon "The Rigid Constitution": "To my mind, it is impossible to conceive of the Constitution of 1787 continuing as it is. It may be that the extra-constitutional devices, to which a people so intensely alive and practical have been forced in working the machinery prescribed by an old and venerated document, will, in the course of time, pull down the Constitution and replace it; or it may be that, by some almost superhuman effort of patriotism and self-effacement, all parties may unite to amend the amending power. I cannot foretell. It seems to be unquestioned that there is no power to amend, except that contained in the Constitution. The optimistic words of Mr. Justice Story: 'The general right of a society . . . to change the government at the will of the majority of the whole people, in any manner that may suit its pleasure, is undisputed and seems indisputable' have no acceptance in law, whatever

Indeed, many leaders in the field of political science have held that, since constitution-framers are neither prophets nor the sons of prophets, no constitution should remain without revision for more than the lifetime of a generation. For such periodic revision of their constitutions not a few of our States provide, and this action is declared to have proved as satisfactory in experience as it is sound in theory.<sup>34</sup>

The statesman should seek to be not so much a conservative as a conservator. It is his task to prove all

they may have in political theory. But the problem will have to be faced some day. . . . That so great a nation has so long submitted to be fettered in its movements by a garment made for it in its infancy is amazing, and is of itself evidence that the people could well be trusted with full liberty in the shaping of their own destiny."—*Political Science Quarterly*, Vol. 20, p. 219 (June, 1905). An American, writing of "Our Changing Constitution," presents the same point of view: "The Constitution can be treated no longer as a written instrument defining the measure of American destiny, but rather as the sum of the political habits and convictions of the nation. . . . The written word does not change, but the consciousness of a progressive society, like that of the human organism, is always changing. . . . The old conflict between the unyielding law and the living organism has resulted, as it must always result, in a victory for the organism. For the letter killeth, but the spirit giveth life."—Alfred Pearce Dennis, in *Atlantic Monthly*, Vol. 96, p. 53 (October, 1905).

<sup>34</sup> Thus, the Constitution of New Hampshire (Art. 99) provides for taking the sense of the people as to a revision of the Constitution and calling a convention for that purpose at the expiration of every seven years. In Vermont, provision is made for the proposal of amendments every tenth year, by two-thirds vote of the Senate. In New York, the question is to be submitted to the people at the general election in every twentieth year: "Shall there be a convention to revise the Constitution and amend the same?" *Constitution of New York*, 1894, Art. XIV., Section 2.

things, and hold fast that which is good. But when he purges away that which is bad, the radicalism of his work is no more destructive than is that of the surgeon's healing knife. For that is no salutary conservatism which consists in holding fast the letter of an ancient law when it has become a menace. Nor, is that high reverence of the Constitution likely to be bred by guarding as sacrosanct a process of electing senators, merely because it is embodied in a century-old Constitution, the sole object of which was to provide for the noblest possible development of that same state. When evils like those associated with the Senate have arisen, it is the mark not of the conservative but of the reactionary, to prohibit formal change in the Constitution, and, by so doing, compel the people to resort to the subversion of the Constitution, or to far more radical action than at first intended. Yet, these are precisely the consequences which have followed because of the resistance which has been placed in the way of submitting this proposal to the people. In many States,<sup>35</sup> the attempt is being made, with a large degree of success, to reduce the election by the legislature to a mere form; thus filching from this clause all its force; while unreasoning resistance to change has done not a little to arouse among the people a regrettable impatience and restiveness under the restraints of a rigid Constitution.

This protest has found its strongest support within the Senate. Yet, there have not been lacking senators who have earnestly deplored the Senate's attitude as reactionary, and, hence, certain to entail radical consequences in the future. For the Senate is a party in in-

\* *Supra*, pp. 138-140.

terest: its character and efficiency are in question. When, therefore, it contemptuously ignores or buries in committee every petition looking toward the submission of the question of popular elections to the people, it can but deepen the people's apprehension and distrust, confirm the belief that the senators by their very attitude confess the existence of the alleged evils, and thus lead, not only to the thorough discrediting of the Senate as a representative body, but to a resort to revolutionary measures to secure the reforms which the Senate's opposition makes otherwise unattainable.

Finally, as an offset to any radicalism which, it is feared, might be encouraged by the adoption of this amendment, attention should be called not only to the precedents afforded by earlier amendments which have produced no such evil effects, but also to two strongly conservative influences, which the adoption of this particular amendment would bring into operation.

In the first place, conservatism would gain through the educative influence of popular elections upon the people. Of the various forms of government, democracy has not at all times proved the most enlightened, the most economical, nor the most effective; but, beyond question—and herein consists its chief advantage—it is the government which is most educative of its citizens. Even the mistakes of democracy, and they have been many, have taught the expensive but convincing lessons of experience. Our campaigns of education are worth all they cost. But presidential elections are widely separated, and often turn on sectional issues. The elections of members of Congress, on the other hand, are within small areas, where per-

sonalities or factional rivalries often obscure broader interests. It is reasonable, therefore, to expect that a system which should call upon the voters at more frequent intervals than the presidential elections, to choose a senator, who upon the great national issues would represent not merely a single district but a State as a whole, would supply a factor in the political education of the people which would undeniably prove of great effectiveness.

In the second place, popular election of senators would conduce to conservatism through the ending of much undeserved criticism and the allaying of anxious discontent among the people. Current comment upon the Senate is largely pessimistic, when it is not revolutionary, in tone. Under present conditions, this is both inevitable and ominous. In no small measure, it is the Senate's attitude of persistent indifference to, if not defiance of, public opinion, which makes the people ever ready to believe evil of it. In recent years, the Senate as a body, and many individual senators, have suffered under suspicions and aspersions, which, though they may in fact have been unwarranted, have been nearly as injurious to reputation and to usefulness as if they had been deserved. For example, within half a dozen years three senators from a single State<sup>36</sup> have been openly charged with the corrupt use of money in securing their seats; yet, no serious attempt has been made to prosecute these charges, and, in no instance, have they been proved to be anything else than a partisan attack upon the senator's reputation. Under a system of direct election by the people, charges

<sup>36</sup> Ohio.

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of corruption could hardly be bandied about with such reckless disregard of any attempt at proof. Restive suspicion would disappear. The great masses of the voters would feel that the country's interests were safe in the hands of men whom the people had chosen. This feeling of self-dependence is, in itself, one of the chief advantages of democratic government. Moreover, the senator thus elected would possess and be heartened by the people's confidence, until he showed that he no longer deserved it. But if an unworthy candidate were elected, then there would be no intermediate electoral body upon which the self-justifying voters could shoulder off the blame. If rascals should continue to succeed in getting elected to the Senate by the votes of the people, the ugly fact would be laid bare that the people themselves had been culpably negligent, or that they had been hoodwinked or corrupted, and the same vigilance which has rescued many a State and city from the grip of the ring and the boss would be brought to the regeneration of the United States Senate.<sup>87</sup>

<sup>87</sup> Recent events in New York and Philadelphia, in Wisconsin and Missouri, furnish abundant illustrations.

## CHAPTER IX

### THE ARGUMENT AGAINST POPULAR ELECTION OF SENATORS

#### A. THE SENATE AS A POLITICAL INSTITUTION WOULD NOT BE IMPROVED BY POPULAR ELECTIONS.

*1. The present scheme of congressional representation was wisely planned.* Nothing more plainly marks the tyro in politics than his eagerness to secure radical changes in existing institutions without first asking whether the alleged abuses find their real source in the institution which he assails; whether the remedy he proposes is appropriate or adequate, or whether its application will produce disorganization and other evils worse than those which it aims to remove. To prove that the Constitution of the United States should be so amended as to provide for the election of senators by popular vote, it is not enough to point out deplorable defects in the Senate: it must further be proved that these defects are due to the present method of election, that popular elections are calculated to remedy the evils and to do so without causing disproportionate injury to the structure and working of American government.

The scheme of representation in Congress is no haphazard affair which slipped into the Constitution by

accident. It was the subject of long and anxious debate on the part of the members of the Federal Convention, who insisted that every essential interest should be given adequate consideration. They therefore adopted the plan of a bicameral legislature, with the two houses chosen upon different bases, the House standing for population, while the Senate represented States as such. For this, the federal system afforded a natural and convenient basis, the lack of which has puzzled every English publicist who, while recognizing that the House of Lords has become an anachronism, is yet at a loss to suggest a basis upon which a logical upper house to replace it should be chosen.<sup>1</sup> This bicameral system, together with the long term and gradual renewal of the Senate, secures a representation of both the radical and the conservative tendencies such as is essential to the progress of every great democratic state. Moreover, there comes to the Senate a degree of independence from the very fact of its election from a source other than that of the representatives, which is highly essential to its exercise of a salutary check upon the House.

It is often implied that the election of senators was put in the hands of the state legislatures merely because with the then crude means of communication, popular elections were impracticable. But there were

<sup>1</sup> "The Senate has always had especial interest for English constitutionalists, who, at heart, all distrust government by a single chamber, but are worried by the reflection that the British plan of making a second one is illogical, is a survival only to be justified on assumptions which are extinct, and is, in some way, a reproach to the representative system with which it is inconsistent."—London *Spectator*, March 27, 1897. *Supra*, pp. 121, n. 20; 166, n. 12.

other and stronger reasons back of the decision to vest this election in the legislatures, reasons some of which the experience of a century has served to strengthen. Probably by native ability and certainly by position, the average member of a legislature is better qualified to choose a senator than is the average voter. It is a rare thing for a man to enter the United States Senate without having served an apprenticeship in Congress or in the legislative or administrative service of his State. Now, the framers of the Constitution, with careful deliberation, adopted a plan which placed the election of senators in a small body of picked men, selected for responsible service by their fellow-citizens, and placed in position where they can inform themselves with ease and thoroughness as to the character and public life of the various aspirants for senatorial honors. Furthermore, an election by the representatives of the people makes possible a choice which shall signify the sober second thought, the abiding purposes of States, rather than the passing whim of the people. The very choice of men for membership in the legislature should mean, above all things, the people's confidence in their ability and integrity in serving the interests of the public. They are charged with these duties for a term of years, and the sobering experience of doing the State's work should fit them with all the greater discrimination and sense of responsibility to proceed in the choice of the State's representative in the Senate.

From the days of the Convention to the present, it has been held by many of the foremost American constitutionalists that, in a special sense, the election of

the senators by the legislatures makes the senators the representatives of the State as such,<sup>2</sup> and the defender of its rights. *The Federalist*<sup>3</sup> declared that this mode of election gave to the States such an agency in the forming of the federal government as must secure their authority; and Chancellor Kent found in this elective process a recognition of their separate and independent existence, which renders them absolutely essential to the national government.<sup>4</sup> It is true that the senators might be placed in office in some other way, and yet stand for the statehood of their respective commonwealths. But the legislature is thoroughly representative of the State, at least in the way in which it chooses to be represented for its own most important business; and a delegating of authority to the senator by its members, seems far more warranted and in accordance with genuine democracy, than the appointment of judges by a governor. The choice must certainly be made between election by the legislature or by the direct vote of the people.

Nor is there need of replacing legislative by popular election for the purpose of making tardy atonement for the fathers' "distrust of the people." Legislative election was adopted because, under the conditions then prevailing, it had proved itself a serviceable method in many and varied applications; and not one word in the Convention's debates implied that the legislatures had abused this power. In fact, members of the Convention showed not so much a contemptuous distrust

<sup>2</sup> *Supra*, p. 160.

<sup>3</sup> No. 62.

<sup>4</sup> *Commentaries*, Pt. II., Lect. 12, p. 226.

of the people, as a little wholesome knowledge of themselves, and of the men whom they represented. They knew, as Senator Hoar has said, that "although every Athenian citizen might be a Socrates, every Athenian assembly would still be a mob." The Constitution, therefore, deprecated the immediate action of the people, in order that they might not "wed Raw Haste, half-sister to Delay." The framers of that instrument of government had more courage than many of their modern critics, for they had enough faith in the people to dare to appeal to their self-control. "They trusted the people with a profound and implicit trust when they submitted to them constitutions, both state and national, filled with restraints which alike secure minorities against majorities, and secure the whole people against their own hasty and inconsiderate action."<sup>5</sup>

The proposed measure is often urged as necessary in order to render the government of our great federal state more consistently democratic. Modern democracy is dogmatic, and impatient of inconsistencies. "What the people are authorized to do indirectly through the means of the ballot, they should be permitted to do directly through that medium;" "the people are intelligent enough to choose their governors; why should they not elect United States senators, also?" "an amendment giving the election of senators to the people is but a just tribute to the intelligence and integrity of the individual voter;"—such are the phrases in which this movement is often set forth. "Gratitude," said the French cynic, "is an exception-

<sup>5</sup> G. F. Hoar, in *Congressional Record*, April 7, 1893.

ally lively sense of favors to come." When, on the eve of an election, a senator's appreciation of and gratitude to the people, seeks expression in such sounding phrases, hard-hearted, or hard-headed, indeed, would be the voters who would fail to see, in the perspicacity which had discovered in them such eminent qualities, proof positive of statesmanlike ability clearly entitling the candidate to reëlection for another term. More and more, American government has been democratized, in the sense of the voters taking power directly into their own hands. In some state governments, this has been carried to absurd lengths, and entirely non-political offices, such as secretary of state, clerk of court and register of deeds, are chosen by an electorate who know next to nothing of the nature of the work to be done, or of the candidate's qualifications for such service. In many a State, popular election of judges has yielded results calculated to make the judicious grieve. Ultimately, we shall come to see that democracy's problem is to secure the best service; that "it is of the essence of democracy that the majority decide who shall hold and administer offices. Democratic principle does not define how they shall be elected."

2. *The present method of election has worked well.* Of all the upper chambers in the world, the United States Senate has been generally conceded to be the most successful. It has won the approval of publicists, both at home and abroad. Says Mr. Bryce: "The Senate has succeeded in making itself eminent and respected. It has drawn the best talent of the nation, so far as that talent flows to politics, into its body, has established an intellectual supremacy, has furnished a

vantage ground from which men of ability may speak with authority to their fellow-citizens."<sup>6</sup>

If imitation be the sincerest praise, then it is significant that the United States Senate has served as the model for the upper house in the legislature of a considerable number of other federal governments. To begin nearest home, in 1861, the framers of the Constitution of the Confederate States of America copied the provision: "The Senate . . . shall be composed of two senators from each State, chosen for six years by the Legislature thereof." With the page blank before them, their experience with election by the legislatures had been so much to their satisfaction that they wrote that down without the slightest change. In the South American republics the United States system has been generally copied. In Switzerland, the Council of States is composed of two members from each canton. The method of choice is left to the canton to determine; in some, they are chosen by the legislature, in other by the direct vote of the people.<sup>7</sup> In the German Empire, the members of the Bundesrath are, in no case, chosen directly by the people: in the monarchical States, they are appointed, while, in the free cities, they are elected by their senates. In France, save for the life senators, a group now in process of rapid elimination, the members of the Senate are chosen "in each department of France by an electoral college composed of the deputies, of the members of the general

<sup>6</sup> *The American Commonwealth*, Vol. I, p. 114.

<sup>7</sup> Election by popular vote is said to be getting more common in Switzerland. In the new Australian Commonwealth, there is equality of representation for the several States, but the senators are elected directly by the people.

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councils of the arrondissements, and of delegates chosen by the municipal councils of the communes or towns.”<sup>8</sup> That this method of constituting the Senate was adopted in conscious imitation of the method prescribed by our Constitution, and that this indirectness of election is regarded by some of the most eminent French statesmen as of the highest advantage to the Republic, is not to be questioned. In conversation with Senator Chauncey M. Depew, the Baron d’Estournelles de Constant declared that, “believing the American method the only one by which a conservative upper house could be had, they adopted their [the American] scheme; that it worked admirably, and in his judgment the existence of the Republic had been due to the Senate and the independence it had from the method of its election.”<sup>9</sup>

Plaudits of publicists and imitation by constitution-makers have not been without cause. Under this legislative election, the Senate has won even a higher degree both of power and of eminence than many of the men who planned it anticipated. It has been the arena sought by our foremost statesmen. From generation to generation, the Senate has drawn to itself by natural attraction the men of highest distinction in our public life. It has been the forum of our greatest constitutional debates, the field of our noblest statesmanship. It was in the Senate that Benton and Webster, Calhoun and Clay, Sumner and Sherman, Hoar and Edmunds have done their chief work. Nor has its appeal

<sup>8</sup> A. L. Lowell, *Government and Parties in Continental Europe*, Vol. I, p. 20.

<sup>9</sup> Letter of Senator Depew, September 29, 1904.

lost its force. It is a frequent occurrence that governors of great States resign to enter the Senate; and, in recent years at least, one member of the Supreme Court and one attorney-general of the United States have abandoned these offices, though, at the time, exceptionally prominent and influential, to accept seats in the Senate.<sup>10</sup>

Moreover, the Senate has, in the main, possessed the confidence of the public. For, legislative election has by no means prevented the choice of men whom the people had already delighted to honor. A study of the biographical sketches of senators shows that, at the time of their election to the Senate, a large proportion of them have stood upon a record of long service in administrative or legislative office to which they had been chosen by the direct vote of the people.<sup>11</sup> Mr. Bryce has computed that, "Of the seventy-six senators who sat in the Forty-eighth Congress (1883-85) thirty-one had sat in the other house of Congress and forty-nine had served in state legislatures. In the Fifty-second Congress (1891-93), out of eighty-eight senators, thirty-four had sat in the House of Representatives and fifty in state legislatures. Many had been judges or state governors; many had sat in state conventions. Nearly all had held some public function.<sup>12</sup> The following table shows, in the case of four States of different sections and of widely different history, the previous experience which senators had already had, at the

<sup>10</sup> For example, Governor La Follette of Wisconsin and Governor Frazier of Tennessee, in 1905; Justice David Davis, in 1876, and Attorney-General Philander C. Knox, in 1904.

<sup>11</sup> *Supra*, p. 81.

<sup>12</sup> *The American Commonwealth*, Vol. I, p. 117.

time of their election, in offices to which they had been chosen by the direct vote of the people. The lists include all the senators of each of the States, from the time of its admission to the Union to the first session of the Fifty-eighth Congress:

PREVIOUS SERVICE OF U. S. SENATORS IN ELECTIVE OFFICE.<sup>13</sup>

Office.	Mass.	Ohio.	Ill.	Cal.
House of Representatives.....	20	9	10	7
State legislature or governor..	8	13	8	6
Other important elective office,	4	5	2	4
No experience in elective office,	4	5	2	4
—	—	—	—	—
Total.....	36	32	22	21

It is evident, therefore, that the candidates most frequently chosen by the legislatures are men who have already received proof of the people's confidence. Moreover, not less readily than to the House, do all classes of citizens appeal to the Senate for the righting of wrongs, or for needful legislation. Indeed, as Senator Hoar shrewdly took pains to point out, "Even the friends of this amendment [for popular elections] come here [to the Senate] for its first serious consideration."<sup>14</sup>

3. *The Senate has repeatedly proved itself the most trustworthy guardian of the people's freedom and honor.* If the Senate has come to be "overshadowing," if it has encroached upon the other branch of Congress, it is largely because the chamber whose members are elected by the direct vote of the people has

<sup>13</sup> In this table, the classes are mutually exclusive, i. e., a man who had served in the House of Representatives is put in the first group, although he might also have been a state governor, etc. The table takes account of elected, not of appointed, senators.

<sup>14</sup> *Congressional Record*, April 17, 1893.

renounced its rights, and has submitted to take a subordinate position. Members of the House, itself, have repeatedly asserted that the reason why the movement for the direct election of senators had not already been carried to a successful issue, was that the people hesitated, inasmuch as they had discovered that when any serious question arises its only worthy discussion takes place in the Senate, and not in the House elected by the people, where such measures are railroaded through by a partisan speaker "under the rules."<sup>15</sup> "The Senate," said Congressman Simpson, "is the only representative body the people have in the United States. It is the only place where their desires can get voice, and if you keep on in this course, you will make that body popular and this body unpopular."<sup>16</sup> In fact, never was there more need than to-day of a Senate as a con-

<sup>15</sup> One of the most notable illustrations of this contrast was afforded by the debate upon the war resolutions in the spring of 1898. "In the Senate, in the debate which resulted in a vote to invoke war, the twenty-five or thirty speeches made were restricted, on the last day, to the time of twenty minutes, for the most part by general agreement, but the thought of preventing a man from explaining his vote to his constituents and to the country was never entertained for a moment. Especial courtesy was shown to those opposed to the resolutions under discussion, and the senators who had determined to vote against them were given unlimited time to present their views. There was a marked contrast to this in the House. There, no member was allowed to debate the war resolutions on their final passage. There were five representatives opposed to them, but none of them was afforded the opportunity to state his reasons, though one member earnestly solicited the privilege of being permitted to do so."—*Boston Herald*, April 12, 1898. Yet the Senate's action, in this case, though more deliberate, was not less radical than that of the House.

<sup>16</sup> *Congressional Record*, May 11, 1898.

servative and stable body, to offset the rule-ridden House. In the first place, it insures not merely a reconsideration of every measure—that could be had from a popularly elected Senate—but “the measure must run the gauntlet of two diverse interests, and be judged from at least two different points of view.”<sup>17</sup> In the second place, a Senate constituted by election by state legislatures undoubtedly insures calmness and deliberation of discussion. Great as the abuse of the Senate’s freedom of debate has been, it is not nearly so serious a menace to public safety as is the reckless hasty and partisan manipulation which characterize much of the action of the House. In the Senate, freedom of debate and of amendment still survive; when they shall disappear there, to the same extent that they have already disappeared in the House, popular liberty will suffer serious invasion. The story goes that, in 1787, some men were discussing the Constitution’s adoption of the bicameral system; the utility of the Senate was brought in question, whereupon one of the listeners asked: “What do you do when your tea is too hot?” “I pour it into the saucer to cool,” was the reply. “Well,” the questioner rejoined, “the Senate is the saucer!” Time may have made the homely figure obsolete, but it has increased rather than diminished the imperative need of a stable and conservative Senate. Anything that tends to impair that stability and conservatism must be looked upon with grave apprehension.<sup>18</sup>

<sup>17</sup> Senator Hoar, in *Congressional Record*, March 7, 1893.

<sup>18</sup> There were those who foresaw this need with surprising clearness at the time of the framing of the Constitution. James

B. POPULAR ELECTION WOULD CAUSE GRAVE INJURY  
TO THE SENATE AS A POLITICAL INSTITUTION.

*1. Popular election would mean the choice of senators by party conventions.* The election of senators by the direct vote of the people is often advocated in phrases very pleasing to the ear of Demos, but every candid observer must question whether, if an amendment of the Constitution should go into effect to-day, providing for the substitution of popular for legislative election of senators, in the great majority of the States the people would be one whit nearer sharing in the real choice of senators than they are now. For choice and election are not identical processes, and popular election would really mean choice by party convention. In States where one party had a strong lead—and there are few really doubtful States—the convention's choice would be tantamount to an election. It remains to inquire, therefore, whether there is gain in substituting a party convention for the legislature as the body which shall virtually elect senators.

The member of the legislature is elected by the

Iredell of North Carolina, later a justice of the Supreme Court of the United States, in 1788 declared:

"Considering that in every popular government the danger of faction is often very serious and alarming, if such danger could not be checked in its instant operation by some other power more independent of the immediate passions of the people, and capable, therefore, of thinking with more coolness, the government might be destroyed by a momentary impulse of passion, which the very members who indulged it might forever afterwards in vain deplore. The institution of the Senate seems well calculated to answer this salutary purpose."

voters acting under an elaborate system of state regulation, enforced by bi-partisan boards of registrars, or inspectors; the delegate to the convention is chosen in a comparatively loosely regulated party gathering, usually attended by but a small minority of the members of the party, in which small minority, however, the active politicians, the men who "know what they want," are largely in evidence. In other words, the danger is that the real choice of senator will pass to a caucus or convention, for which, in the words of "Hosea Biglow":

"the call comprehen's

Nut the People in person, but on'y their frien's,  
. . . . . o' the sort that pull wires  
An' arrange fur the public their wants an' desires,  
An' that wut we hed met fur wuz jes' to agree  
Wut the People's opinions in futur should be."

The legislator is elected for work of the highest importance to the State; he is to consider the wide range of the State's interests, and serve them; the delegate is chosen to help make, or rather register, a single nomination. The legislator serves one, two or more years, and his acts are under the eye of the public, in accordance with fixed rules and procedure, and are a matter of record; the delegate meets with his fellow-members at about noon, and, "when the mists of evening rise," his work is done, for his term of service consists of but a few hours in a more or less tumultuous and boss-ridden assembly, where his acts are not recorded. The legislator acts under oath, and upon his personal responsibility, for, if he aspires to higher station, his record must be satisfactory to his constituents; the delegate acts upon no clear responsibility—he may even act by

proxy. If it is charged that the legislatures, in electing senators, are easily corrupted, what shall be said of the convention's openness to corrupt influences? Its members meet as strangers, acting under the lax supervision of their friends of the party, and for the sole purpose of making a nomination to promote someone's interests in working for a much-coveted office. In the Republican convention in Ohio, April 24, 1900, the proceedings were opened with minstrelsy; the delegates joined uproariously in a song, entitled "We Know Our Business." It may have been for the very reason that they did know their business, that they thought it unnecessary to follow the usual practice and open the session with a prayer for divine guidance.<sup>19</sup>

*2. Popular election would seriously impair the conservatism of the Senate.* To the efficiency and strength which the Senate has attained and preserved, hardly anything has conduced in so high a degree as the independence of the senator's position and the reasonable certainty of continuity of service during successive terms. Both of these elements of conservatism and strength would be seriously menaced by popular election. Knowing that he must face the judgment of the stump and of the press—the lynch law of politics—the senator, as a popular election approached, would be tempted to trim his sails to every party breeze, and the sturdy independence with which many a senator has calmly disregarded political flurries, would give place

<sup>19</sup> Two points, however, must be borne in mind: The legislature's choice is often determined by the action of a party caucus, under conditions very like those which surround the convention; and the convention's action is subject to revision and rejection by the people, whereas the legislature's election is final. *Supra*, pp. 39, 200-201.

to a catering to the people's prejudices little likely to yield light or leading.

Again, the choice of senators by state legislatures has tended to produce a continuity of service, and hence an efficiency based upon long experience in legislative work, highly exceptional in popular governments. In the Senate of the Fifty-ninth Congress are—forty-one senators who have served at least one previous term in that body; eleven have been in continuous service in the Senate from 10 to 15 years; seven from 15 to 20, and five from 25 to 33 years. Such examples of repeated reëlection to this long term are neither exceptional, nor are they to be confined to any one section. But if the effects of popular elections be judged by results produced in the election of governors and of representatives in Congress, it is clear that the trading of localities, the restless craving for rotation in office, the insistence that the prizes be widely distributed, would make it highly improbable that a senator would be given more than one or, at most, two terms. When the loss to the country is estimated if the service of a Webster or a Clay, a Sherman or a Hoar, were limited to six or even to twelve years, the innovator may well hesitate to urge popular election; for the evidence is incontrovertible that the American people still cherish the notion of rotation in office, and that they are particularly loath to reëlect men for long terms of legislative service.<sup>20</sup>

3. *Popular election would increase the number of disputed elections and the difficulty of their just settlement.* Each house of Congress is the judge of the elec-

<sup>20</sup> *Supra*, p. 167.

tions of its own members. In the Senate, the contests have been comparatively few, and the issues involved have usually been simple legal questions. There have been some partisan decisions, it is true; nevertheless, precedents have been followed with a consistency which, on the whole, is surprising. For example, despite the enormous party advantage often to be gained by a single vote, for eighty years and more the Senate has refused to admit a senator appointed by a governor, when the legislature had had the opportunity, but had failed to fill the vacancy. In the House, on the other hand, there have been about 350 contested election cases, and their determination has often been a national scandal. It is a familiar story, that Thaddeus Stevens chanced one day to enter the House at the very moment when the roll was being called upon an election contest. As the call had nearly reached his name, and he wished to inform himself instantly how to vote, he hailed the Republican nearest him with the question: "Which is *our* damned rascal?" That covered the whole issue. It would hardly be an exaggeration to say that, in the majority of these contested election cases in the House, the decision has turned, not upon a judicial weighing of evidence, but upon this bald question of party proprietorship in the contestants. If, now, the election of senators be transferred from the legislature to the polls, in case of a disputed election, the Senate must pursue its inquiries as to the proceedings in the election throughout entire States—whether little States like Delaware, or great Commonwealths like New York or Illinois—and the increase of partisan spirit in the Senate could not fail to be greatly increased. Even ardent advocates

of the popular election of senators, like Senator Bailey of Texas, have been forced to admit that, under such circumstances, the Senate's decision of contests would be as purely partisan as are those of the House, and that this constitutes "a very strong argument against the change."<sup>21</sup>

*4. Popular election would increase the influence of mere numbers, and of city populations.* Under popular elections of senators, the power of determining the choice, instead of being distributed throughout the State, in accordance with the method which the people of that State believe will yield the best representation, would be transferred to the great cities, to be settled by sheer shock of numbers. We are still far from solving the problem of city government. One of the most discouraging features of the situation is, that while one-fourth of the population of the United States is living in cities of 100,000 or over, more than one-half of the foreign-born are living in these same large cities. Moreover, it is to these cities that those immigrants go by preference who are of the nationalities most illiterate and least akin to our English-speaking stock. Here, their ignorance of the language and custom of the country and their lack of place-feeling make them the easy prey of the demagogue who seeks profit in their votes. Now, the systems of representation prevalent in the several States place substantial restraints upon the weight of mere numbers in constituting the legislatures. In some instances, it is true, these restraints are accidental or hereditary, and, as in Connecticut, they constitute a system which finds few defenders except

<sup>21</sup> *Congressional Record*, Vol. 35, p. 5207 (May 9, 1902).

those whose party is bolstered up by the peculiar make-up of the legislature which results. In other States, however, these restraints are deliberate and purposeful. They frankly aim to secure a representation of the State as a whole, keeping down the influence of great cities with their teeming slums, and floating irresponsible lodgers, and preventing any one city from controlling the legislature. Illustrations of this are to be found in the Constitutions of New York, Rhode Island and Pennsylvania.<sup>22</sup> If senators are to be elected by the direct vote of the people, all these restraints are to be swept aside, and the election committed to mere mass, to mere weight of numbers, with no regard to the qualitative elements or to the State's varying sections and interests, except as these may chance to be served by proportionality to population. In the words of Senator Hoar: "The people are represented in the state legislatures by their neighbors and associates, by men whom they respect, and who represent local feeling. The farmer class, which has its just weight, will be outweighed by the dwellers in great towns, where the extremes meet, great wealth and great poverty, and combine to take possession of the powers of government."<sup>23</sup>

5. *Popular election would threaten the equal suffrage of the States in the Senate.* Popular election would put severe strain upon the federal system by menacing equal representation<sup>24</sup> of the States in the Senate. Just as

<sup>22</sup> These and other illustrations have been discussed by the present writer in detail in *Representation in State Legislatures*, pp. 26, 51, 77, 97.

<sup>23</sup> *Congressional Record*, April 7, 1893.

<sup>24</sup> In one sense, popular election would tend to promote equality

the election of senators by the direct vote of the people would transfer the power of choice from the State, represented as a whole, to the mere weight of numbers, congested in great cities, so, in the nation at large, it would tend to alter the relation of the States to the general government, and to shift the power decisively into the hands of the more populous States. Now, to the framers of the Constitution, it seemed essential, not only that, in the Senate, the States should be represented as States, but that representation of statehood should be symbolized by giving to the States "an equal suffrage," in the sense that each State, whatever its size, should have two members. Of such preëminent importance did the fathers deem this provision, that they singled it out from all the provisions of the Constitution, and secured it even against amendment in the ordinary manner. Election by state legislatures is accordant with the spirit of this representation of statehood. The one body which is so constituted as to represent the State's diverse interests, is commissioned to choose the State's representative in the Senate. But, to impetuous modern democracy, these restraints in the interest of the minority, and of the smaller States, seem obsolete. If, then, the election of senators were placed directly in the hands of the people, the returns from the several States, from New York and Nevada, from Pennsylvania and Delaware, would come into sharp contrast, and the feeling would almost inevitably arise that these senators were elected no longer by States of equal dignity as members of the federal Union, but by

of representation, which is now often prevented by the vacancies caused by legislative deadlocks. *Supra*, pp. 160-161, 195, 214.

grossly unequal blocks of population. More than one statesman of eminence—in particular, Senator Hoar—has expressed grave apprehension lest the discontent, which would ensue, should lead to a repudiating of the original contract and the overthrow of the federal system—lest New York and Pennsylvania should be brought to the point of saying: “This is not the equality for which we made concessions in 1787, and we refuse longer to be bound by that agreement.”<sup>25</sup>

<sup>25</sup> Referring to this provision, however, an American publicist says: “The Constitution secures this equality even against amendment in the ordinary manner. . . . This is unwise and unnatural. It is not possible that this restriction could stand against a determined effort on the part of the State within the constitution to overthrow it. It is a relic of confederatism, and ought to be disregarded. . . . No constitution is complete which undertakes to except anything from the power of the State as organized in the constitution. Such a constitution invites the reappearance of a sovereignty back of the constitution; i. e., invites revolution.”—J. W. Burgess, *Political Science and Constitutional Law*, Vol. I, p. 49.

If the people of the United States ever become thoroughly convinced that “equal suffrage in the Senate,” as prescribed by the Constitution, has in fact become grossly unequal, a way will be found to readjust the Senate’s representation, even without the consent of the objecting States. In doing this, they would merely be following the example of the framers of the Constitution, whose action in disregarding the method of amendment prescribed by the Articles of Confederation was “unconstitutional” and revolutionary, yet warranted by the national exigency. Indeed, publicists have already arisen who insist that equal representation in the Senate is not of the essence of the federal system, and that we may be running risks of hindering the highest success of that system, if we confine it to the rigid form of representation prescribed by the Constitution. See J. W. Burgess, in *Political Science Quarterly*, Vol. 17, pp. 661-2 (Dec., 1902).

The question, “Is the Senate Unfairly Constituted?” is well discussed in the *Political Science Quarterly*, Vol. 10, pp. 248-256

C. THE EFFECT OF POPULAR ELECTIONS UPON THE  
CHARACTER OF THE SENATE WOULD BE  
UNFORTUNATE.

Nor are popular elections to be advocated with a view to bettering the character of senators or raising the tone of the Senate. In recent years, it has become more or less the fashion to denounce the Senate. Editor and preacher, pamphleteer and publicist have been attacking it in a temper little calculated to do it justice. It is not to be denied that there are senators who are of little credit to the Senate, to their State or to the country—men who are in the Senate merely because of their wealth or of their proficiency in the arts of the cheap politician. Because the senator is a member of a small body and occupies a position of great influence, his every defect or dereliction gets instant and wide notoriety, and, forthwith, the impressionistic phrase-maker sets forth the Senate in the most lurid terms. Despite such caricatures, the Senate to-day contains a large proportion of men who, in ability, reputation and experience, may well challenge comparison with the members of the House, or of any other legislative body in the world. For the occasional lapses, or exceptions, adequate explanation may be found quite aside from the method of their election. From the nature of his position, the senator is subjected to the fiercest temptation. In the state legislatures, the Senate is often the more (June, 1895), in an article of that title by S. E. Moffett. He shows that the United States often gets its best senators from the smaller States, and that the small States have no distinctive interests, as small States, which have induced, or will induce them to oppose the large States.

corrupt body, yet it is elected by precisely the same process as the lower house, so that this explanation is entirely unavailable. But, because of its smaller size, and longer term, a vote in that body becomes of great weight, and hence the state Senate, rather than the House, becomes the target for the corruptionists and the goal for the grafter.

As to the alleged deterioration of the Senate in recent years, it is, in part, a figment of the imagination, a harking back to a golden age when all senators were Nestors or Catos. Research will fail to disclose a time when the Senate did not contain men whose presence there was not chiefly to be attributed to their wealth or to their adeptness in playing the game of politics, for the love of the game or for the prizes which it might yield. If it be true that these less desirable elements are now present in larger proportion than formerly, it but reflects a change in national ideals. American life has become commercialized, and the highest recognition in politics, as well as in society, is easily accorded to the man who has met the supreme test by proving his capacity to amass a huge fortune.

Little gain in elevating the tone of the Senate, therefore, is to be anticipated from popular elections; the remedy is not adapted to the real difficulty.<sup>26</sup> If it be

<sup>26</sup> The responsibility for the evils of the present system, ex-Senator Edmunds apportions as follows: "Whatever faults now and then happen under the present system do not arise from any fault in the system itself, but from the fault of the body of citizens themselves—non-attendance at caucuses and primaries; non-attendance at registration and at the polls; slavish fidelity to party organizations and party names; a contribution to and winking at corrupt use of money at nominating conventions and elections,

granted that, in recent years, the quality of the Senate has fallen far below the ideal, or even far below the standard set by the Senate of the fathers, the significant fact is that, during these lean years of alleged deterioration, the method of electing senators has not changed. It was this very system (choice by state legislatures) which gave the Senate of the Golden Age; it was this very process, against which such heavy denunciations are now hurled, which rendered preëminent service to the country, and constituted a Senate which was recognized as the model "upper house" among the legislatures of the world. If, then, it be true that the Senate has now fallen upon evil days, the real causes must be sought elsewhere than in the mode of election: they must lie back of that, and interfere with and pervert its present working. Hence, scant promise of thoroughgoing reform can be found in a movement which contents itself with a mere change in the method or agency of election which has remained unchanged since the time when it yielded ideal results.<sup>27</sup>

And, not only can it be argued that the substitution of popular for legislative election of senators would fail to reach the underlying causes of the evils it seeks to remove, but that, in several respects, it would contribute positively to degrade the Senate. In the first place, it and the encouragement or toleration of individual self-seeking in respect of getting possession of offices, all of which are truly public trusts."—*Forum*, Vol. 18, p. 278 (Nov., 1904).

<sup>27</sup> *Supra*, pp. 184, n. 4; 197. Attention should be given the question, whether in recent years the state legislatures have not been beset by new conditions which have rendered them less trustworthy for the work of electing senators, as well as for doing the ordinary work of legislation. Hence, the growing movement to curb their powers by direct legislation.

would offer wider scope to the demagogue and haranguer. As with presidential candidates, the chief qualification to be considered would come to be not ability to perform the delicate and arduous duties of his office, but availability as a vote-getter. Many of the most serviceable men now in the Senate would prove impossible candidates in a popular election. Their careers and their capabilities make no appeal to the people's imagination. Long schooling in statecraft, ability to master intricate problems of finance, to keep one's head in the midst of popular clamor, to hold one's tongue when public policy demands silence—these are not "taking" qualities; and the candidate in whose behalf were urged such grounds for election or reëlection by popular vote, would find a seat in the Senate the easily won prize of his rival of the magnetic personality, the master of perfervid oratory, or the wearer of a khaki uniform. Conscious of this fact, many a man who might worthily aspire to a seat in the Senate would renounce that ambition without making a contest, rather than ape the arts of the candidate whose policy consists in making himself solid with the masses by catering to their whims, who, with his ear to the ground, seeks to form his "conviction," not from the reason but from the prejudices of the people.<sup>28</sup>

<sup>28</sup> A single illustration may serve by contrast: From the very outbreak of the Spanish War, Senator Hoar had been an outspoken critic of the Administration. When the end of his term approached, in the State at large, there was widespread impatience and dissatisfaction at his course; but, when his name came before the Massachusetts Legislature of 1901, his real merits and services were weighed without prejudice, and he was reëlected by a vote of more than three to one in each house.

Moreover, popular election would open new doors for corruption. Perhaps more frequently than on any other ground, the election of senators by the direct vote of the people is advocated upon the claim that it would bring to the Senate men of clean hands, since it would put an end to the corrupting influences which now surround the election in the legislature. It is true that in the small number, whose vote in a legislative election is decisive, there lies a strong temptation to the bribe-giver. But present corruption, so far as it does exist in the legislative election, is but a symptom, not an ultimate fact. If the legislature is chronically venal, it can only mean that the community itself is corrupt, or hopelessly sluggish in its political life. It is futile to argue that from such a community corruption is to be banished by removing from the legislature the power to elect senators. In the words of the late Senator Vest: "You cannot purify the fountain by changing the form of the stream that comes from it." It must be noted, also, that the adoption of popular elections of senators would do away with some preventives which are of considerable effectiveness against corruption. Elections would then be by secret ballot, and, in States where the political parties were nearly evenly balanced, bribery would tend to become rife, especially in the smaller States, where the turning of a few votes might be decisive of the whole issue. At present, the election is by a small body of men, in responsible position, acting under oath, and voting openly in the sight of their constituents, so that corruption runs the chance of easy detection and of instant and condign punish-

ment.<sup>29</sup> Not only might bribery itself turn the scale at the polls, as in the legislature, but popular elections would be subject to many other assaults which do not extend to the legislature. The addition of the great prize of the senatorship to those which are now to be won at the polls, could not fail to add not a little to that long list of attacks upon the freedom of elections which has stained so many pages of our political history. Naturalization frauds, personation of voters, fraudulent residence, falsified returns—these have been the results where the reward of getting a popular majority had seemed too tempting. To this group of evils, the election of senators by the legislature is not exposed.

But it is not necessary to rely upon *à priori* reasoning alone to forecast some of the unfortunate results which popular election might bring to the Senate. Democracy is very fond of the easy assumption that only good can

<sup>29</sup> Even Delaware has afforded a recent illustration of the restraining influence exercised by the open ballot. "Senator Farlow and Representatives Clark and King (all Democrats) voted for Addicks several times in the closing days of the session, and were not only hissed and groaned at by their fellow members, but were treated with contempt at their home towns and boycotted in their business. On leaving the legislative hall for their homes, they were followed by an angry mob, and were protected from violence by the sheriff and his assistants. . . . They were severely censured by their party and requested to resign by the Democratic state central committee. They gave as their reason their wish to defeat the election of a regular Republican." It was reported that every one of them determined to leave the State, rather than try to live down his evil notoriety.—*Associated Press* dispatches (March, 1897). Yet, this was in a State where corruption at the polls was notoriously prevalent, and was treated as a venial offence.

come from a direct vote of the people, oblivious of the fact that it is upon the intelligence<sup>30</sup> and integrity of the vote, not upon its mere directness, that reliance must really be placed. Popular elections for other offices have yielded anomalous results. There is hardly a State in the Union whose citizen will not find more to gratify his civic pride in the list of his State's senators than of its governors or representatives, chosen, though these were, by the people. There is no class of senators, whose presence to-day in our upper house seems an affront and a menace to democracy, upon the most conspicuous examples of which the States have not showered their highest honors, by popular vote. David B. Hill, William J. Stone and George Peabody Wetmore had all been governors before they were elected to the Senate; Quay had been state treasurer, and Thomas C. Platt had served for repeated terms in Congress. Benjamin F. Butler was once governor of Massachusetts and for many terms a representative in Congress, but the Massachusetts legislature never sent a man of his type to the Senate. In 1903, the lower house of the Delaware legislature voted unanimously in favor of applying to Congress to call a convention to propose the amendment for popular election of senators. No "Union Republicans" opposed this action. Why should they? At the last election the votes of the people had given them the governor and more than forty per cent. of the members of the legis-

<sup>30</sup> Upon this point, Herbert Spencer (*Essays, Moral, Political and Aesthetic*, p. 181) quotes Carlyle's pertinent query: "If, of ten men, nine are recognizable as fools, which is a common calculation; how, in the name of wonder, will you ever get a ballot-box to grind you out wisdom from the votes of these ten men?"

lature, so that it was by no means clear that the sole object of their party's existence might not sooner be attained by popular than by legislative elections.<sup>31</sup>

<sup>31</sup> Another illustration of the fact that the voters may be so debauched or so befogged that direct elections could accomplish little in the way of reform was recently afforded in Pennsylvania. Says the *Outlook*: "One Pennsylvania legislator after another has appeared before the investigating committee at Harrisburg and told of the offers of bribes ranging from petty offices for their friends to as high as \$5000 for themselves if they would support Mr. Quay in various ways; but, in spite of all this testimony, the primary elections recently held have resulted in Quay victories. In Lancaster County, where only 18,000 Republican votes were polled last fall, about 16,000 were cast at the primaries, and nearly two-thirds of them were cast for the Quay candidates. The fact that Quay was the "regular" caucus candidate for the Senate and the argument that the scruples of his opponents might cost the party a senator in the next Congress seemed to outweigh all other considerations. The result is that Mr. Quay's cause has now recovered prestige, when, on moral grounds, it should be losing it" (April 8, 1899).

## CHAPTER X

### THE ARGUMENT AGAINST POPULAR ELECTION OF SENATORS (*Continued*)

#### D. THE ELECTION OF SENATORS BY THE PEOPLE IS NOT NEEDED BECAUSE OF THE ALLEGED EVILS IN STATE AND LOCAL GOVERNMENTS.

IT is not to be denied that grave abuses have gathered about senatorial elections during the years since the Civil War. But careful analysis shows that the worst evils which affect state and local governments can be remedied by other means than a change from legislative to popular election of senators.

1. *Deadlocks.* Chief among the evils which have nearly exhausted the patience of the American people is the legislative deadlock. But, depressing as is the record of the deadlocked elections during the past fifteen years,<sup>1</sup> it should be noted that, though widely distributed, they have been by no means universal. They have been entirely absent from New England and many of the other more conservative States; and their continued prevalence in certain States, notably Oregon and Delaware, warrants the question whether the deadlock is not largely a manifestation of disturbances of primarily local origin. Nor is it to be taken for granted that, even if the balloting is protracted for

<sup>1</sup> *Supra*, pp. 30, 36-38, 69-70.

several weeks, it necessarily interferes greatly with the work of the session. The law requires the taking of a vote daily, but, pending the rallying of support to the successful candidate, this is often a purely perfunctory affair, which exacts but a half-hour daily of the legislature's time. But, even if the worst indictment that can be brought against deadlocks be accepted without qualification, the fact remains that their most flagrant evils can be removed by a very simple change. Exasperation at the delays and the bad spirit caused by deadlocks, leads many men to urge radical amendment of the Constitution to provide for popular elections; whereas, a slight alteration of the law of 1866, regulating senatorial elections, would do away with this one of the defects of the present system. At present, the successful candidate must have received a majority of the votes in the joint assembly, if the election has not been effected by the vote in the houses separately. Failure to muster a majority is, therefore, the cause of the frequent deadlocks, with their manifold attendant abuses. No such difficulties are experienced in other elections, for, in the choice of representatives in Congress and of State and local officers, a plurality is decisive.<sup>2</sup> The natural and easy remedy for the deadlock is to be found in some such regulation as that proposed by Senator Hoar in a bill which provided that when, after reasonable delay, a majority could not be secured, the election should be determined by plurality

<sup>2</sup> It was experiences similar to those in senatorial elections which led Connecticut, so recently as 1901, to substitute plurality for majority elections for the principal officers of the State.—*Constitution of Connecticut*, Article XXX. of the Amendments.

vote of the joint assembly.<sup>3</sup> This could not fail to put an end to the delay or prevention of senatorial elections by deadlocks in the legislature.<sup>4</sup>

Much of the discussion of senatorial elections seems to proceed upon the assumption that there is but a single alternative—either the system as we know it, or else popular elections. But just as in 1866, some of the ablest members of the Senate contended that past

<sup>3</sup>The principal provision of the bill was as follows: "If no person shall have received a majority after seven separate ballots in joint assembly, one of such ballots, at least, having been taken on seven separate days, the person who receives a plurality of all the votes cast on the next ballot . . . shall be declared duly elected."

<sup>4</sup>It would be manifestly unfair to judge of the permanent merits of this measure from the results which it would have produced in one particular session of Congress; yet, it is of interest to observe that, had this proposition gone into effect at the time it was advanced, it would have opened the door of the Senate to Quay of Pennsylvania, Addicks of Delaware and Allen of Nebraska, not one of whom, under the then conditions, could be called the choice of the people of his State, and not one of whom would have contributed to raising the tone of the Senate. It is further to be noted that this resort to a plurality choice might lead to minority elections in legislatures where the majority party was split into irreconcilable factions. However, if anything could serve to bring factions together, it would seem to be this certainty that, unless they did end their differences, the other party would win by plurality vote. The indirect effects of this proposed change, then, would probably be: first, to induce the nomination of senatorial candidates by state party conventions; and, second, to bring the strongest of pressure to bear upon the legislators to stand pat and vote for the regular nominee. In roundabout fashion, it would thus approach the results sought in popular elections; but, of course, the evils inherent in legislative election would still remain—the injection of national politics into state elections and lawmaking, and the choice of senators who could never secure the verdict of the people's approval.

experience offered no justification for congressional regulation, and that it was little calculated to produce beneficial results, so, at the present day, there are those who urge, with much force, that the law of 1866 should be not amended, but repealed, and that the entire regulation of senatorial elections should be remanded to the States, subject to the restraints of the federal Constitution. Each State could then do its own experimenting; and, as in such matters as taxation and ballot-reform, the State whose experimenting has proved successful has soon been followed by others, so it is not unreasonable to hope that a method of electing senators would be devised which would prove decidedly more satisfactory than that now in use. Indeed, something of much this character has already taken place.<sup>6</sup>

2. *Confusion of state and national issues.* As to the confusion of state and national issues, which is alleged to be due to the legislature's choice of senators, while it is undoubted that some such influence is felt, it is impossible to gauge it with any accuracy. Certainly, it is easily overestimated. This method of electing senators is but one of several causes which lead to the merging of state in national politics. The greater dramatic interest of national politics, particularly in relation to foreign affairs; the intense excitement of presidential campaigns, with their insistent appeals to party loyalty; the greater wealth of federal patronage, with its lure to the spoilsman and its encouragement to the party manager to keep the party machinery in perfect order all the time; the frequently recurring elections of congress-

<sup>6</sup> *Supra*, pp. 141-143.

men—all these are potent influences making it the most natural thing in the world for the citizen at the polls and for the member of the legislature to vote upon every matter of state, and even of local politics, according to the behests of the national party to which he has pledged his allegiance. Much as the theorist may deplore this confusion of issues, it is a matter of doubt to what extent it would be prevented or lessened by popular election of members of the Senate. While relaxing not at all the senators' control of federal patronage, this change would throw the fight over their election into the popular arena, and, by putting at stake on the people's vote, the highest office in the land, with the exception of the presidency, it would do not a little to fasten yet more tightly the fetters of the national parties upon the elections and the government of State and city.

3. *Minority representation.* Nor do the evils of minority representation, as occasionally found in the Senate, call for popular election as the remedy. The instances of minority representation are rare. Some are practically inevitable under any system of election; they certainly would recur from time to time, if senators were elected by the direct vote of the people. During the past three Congresses, the district in which the writer lives, though admittedly Republican, has been represented by a Democrat. Factional divisions, the multiplication of candidates, the appearance of some exceptionally attractive minority candidate—these and other causes may easily lead to the defeat of the candidate of the party normally in the majority. Minority representation, as it has come from legislative elections

of senators, has often merely reflected influences such as these, which would have produced a like result, had the election been made by the people at the polls.<sup>6</sup> When this has not been the case, the choice of senator from the minority party has sometimes been due to an obsolete and vicious system of representation in the legislature, which, for the sake of its own interests, the State ought to change, without regard to this question of the best mode of electing United States senators.<sup>7</sup>

4. *Bribery and corruption.* Nor does past experience of bribery and corruption in connection with senatorial elections call for popular election as the remedy. The instances where bribery has been seriously charged have been few,<sup>8</sup> and the cases in which substantial proof has been discovered have been far fewer. Bribery is certainly not more prevalent in senatorial elections than in connection with other matters with which the legislature deals. Its presence is symptomatic of a general low state of political morality, which calls for general remedies. Where bribery charges are not a political bluff, where corruption is seriously believed to have been used, existing law in most States is adequate to meet the difficulty. If public sentiment is not sufficiently aroused to insist upon the

<sup>6</sup> It must be noted, however, that no minority candidate could win an election at the polls, unless he had the backing of many thousands of his constituents, whereas, there have been instances of senators elected at the end of a bitter deadlock in the legislative assembly, who really represented but a very small group of voters. *Supra*, pp. 196-197.

<sup>7</sup> *Supra*, pp. 74, 228.

<sup>8</sup> *Supra*, p. 57.

enforcement of the law as it stands, little gain is to be anticipated from a mere change to popular election of senators. To quote once more the words of Senator Vest: "You cannot purify the fountain by changing the form of the stream which flows from it." In States where bribery and corruption have been more flagrant in connection with senatorial elections than in other elections, or in the ordinary legislative work, the logical proceeding is to direct special legislation toward the curbing of such practices. Several States, notably California and Nevada, have made their laws especially discriminating against bribery, however remotely connected with the election of senators. By the recent California statute, if a member of the legislature, or a member-elect, or a candidate for the legislature, receives any money or property from a United States senator or from a candidate for that office, such "receipt . . . shall be *prima facie* proof of an express or implied agreement . . . that he would vote for such candidate for the Senate, if elected." \*

**E. THAT POPULAR ELECTION OF SENATORS CAN BE SECURED ONLY BY AMENDMENT OF THE CONSTITUTION IS A GRAVE OBJECTION.**

By laws providing for direct nominations and for primary elections, States may try to filch from the legislature the real choice of senator by reducing their

\* California, Act of March 9, 1899. Section 5 of the Nevada law of 1899 is as follows: "No person shall, either in aid of his own candidacy or in aid of the candidacy or election of any other person for the choice of the electors for United States senator, give, pay, expend or promise any money or reward to anyone whomsoever."

act to a mere form, but no assurance can be placed upon thus securing popular control. With the legislature still lies the legal election, and recent experience has proved that the legislature will not hesitate to disregard utterly the clear mandate of the people.<sup>10</sup> Since, therefore, popular elections can be secured only by an amendment to the federal Constitution, it remains to be asked whether the gains would be worth the cost.

Such an amendment would be the first change in the organic structure of the government under the Constitution. Thus far, the amendments have been surprisingly few. The first ten, the "Federal Bill of Rights," were added by 1797, and virtually constitute a part of the original law. The eleventh and twelfth were added before the Constitution was twenty years old, to correct what were considered defects in its operation. The last three sum up the results of the Civil War. Few as are these amendments, it is further to be observed that the eleventh is by many publicists considered to be of more than doubtful merit<sup>11</sup> while the fifteenth, and certain portions of the fourteenth, have been frankly set at naught by a large number of the States. While the Constitution, by virtue of its brevity and comprehensiveness, has given scope for much modification through custom and interpretation, it is evident that formal amending of it has not been strikingly successful. Yet, the amendments thus far made have not aimed to effect radical change in the structure of the government. Before any such radical

<sup>10</sup> *Supra*, p. 193.

<sup>11</sup> J. W. Burgess, *Political Science and Constitutional Law*, Vol. 2, p. 331.

amendment as one providing for popular election of senators is initiated, certain questions arise which demand serious attention.

Would not such a change throw the carefully adjusted mechanism of the federal government out of gear? The Constitution is not a miscellaneous collection of fragments of law, but a painfully elaborated scheme of government, in which the change of a single part may produce unexpected and unfortunate effects upon the working of many others. Not only the direct and intended effects must be considered, but the remoter consequences as well, consequences which may partially or wholly counteract or nullify the anticipated benefits.

In the first place, would aggressive democracy be content with securing the election of senators by the direct vote of the people, while other officials still stood beyond their immediate control? Would not this advance be considered but a single step along the path which leads directly and inevitably to the direct election of President and vice-president, and of the federal judiciary, as well? Such a prospect is one which may well give pause. Yet, these demands have been frequently associated in the past, and many of the arguments which uphold the one may be urged in favor of the others.<sup>12</sup>

To most of the advocates of popular election of senators, it would probably be a gratification if it should lead to the election of the President by the direct vote of the people; but the probability of another con-

<sup>12</sup> In recent years, however, the tendency has been to confine such democratic agitation to the propaganda for the direct election of senators. *Supra*, p. 115.

sequence is thoroughly repugnant to them. The Constitution provides: "The times, places and manner of holding elections for senators and representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time make or alter such regulations, except as to the places of choosing senators."<sup>18</sup>

Subject to the unenforceable limitations of Amendments XIV. and XV., the suffrage in federal elections is left entirely to State regulation. Beyond question, Congress has the right to provide for the supervision of the election of federal officers, a right which it has repeatedly exercised as to the election of representatives in Congress. As to senators, by the law of 1866 it has prescribed the time and method of election; the qualifications of the electors who have chosen senators, Congress has hitherto refused to consider. But the federal supervision of the election of congressmen has always been a source of irritation, and in 1893 all such legislation was repealed. If, now, another great field is opened to elections by popular vote, will not the pressure for the renewal and extension of such federal supervision prove irresistible? If popular election of senators is to be gained only at the cost of enormous increase of centralization in the control over elections, is it to be desired? In 1892, Senator Chandler predicted that the popular election of senators would be followed by popular election of President and by a national election law, which would fix the qualifications of electors and take complete possession of the elective machinery. "Representatives, senators, President and

<sup>18</sup> Article I., Sec. IV., Par. 1.

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vice-president will be chosen at popular elections, called by federal officials, with the voting lists made up by federal officials, and with the counts and declaration and certification of elections made by them.”<sup>14</sup>

So obnoxious was this prospect that the then pending resolution for popular election of senators was amended so as to take away from the United States the right of control which it now has as to its own legislative body, and place that entirely under the regulation of the States. But straightway it was found that this action not only intensified the opposition of many who had been against the original proposition, but it alienated many of its supporters. Ten years later, no doubt with the deliberate intention of killing the measure, Senator Depew moved as an amendment to the pending proposition for popular election of senators, the following: “The qualifications of citizens entitled to vote for United States senators and representatives in Congress shall be uniform in all the States, and Congress shall have power to enforce this article by appropriate legislation, and to provide for the registration of citizens entitled to vote, the conduct of such elections and the certification of the same.” He contended: “If United States senators are to be elected by the direct vote of the people, the people must vote,” and, “if in the election of United States senators a small oligarchy in any great State can send here a representation equal to that of the great State of New York, where we have manhood suffrage . . . then the situation becomes intolerable.” “Why is not that situation now intolerable to the senator from New York?” was the

<sup>14</sup> *Congressional Record*, Vol. 23, p. 3192 (April 12, 1892).

prompt retort of one of the senators from Mississippi, thus frankly calling attention to the fact that the ultimate constituency is now as much narrowed as it would be, were the elections direct. But this answer is not conclusive. Federal control of elections has been temporarily abandoned, but the right to exercise it has not been renounced; in fact, not only the right, but the duty of the federal government to prevent the disfranchisement of United States citizens on account of race, color or previous condition of servitude is clearly asserted in the Republican party platform of 1904. While it is true that popular election of senators would not further narrow the electorate, it would do much to call attention to the extent to which, in some States, it has been narrowed already. The indirect election of senators at present serves in a way as a veil, a disguise. Strip it away, and there is disclosed all the more clearly a condition which many would gladly ignore. There can be no question that, if the scope of popular elections received such an important extension, public sentiment would be much more sharply stimulated to insist upon the prevention of disfranchisement in violation of the spirit of the fifteenth amendment, even if it did not go to the length of requiring uniform qualifications for a suffrage to be exercised under federal supervision. The extent to which the probability of this consequence has brought confusion into the ranks of the advocates of the popular election of senators is indicated by an episode in a recent debate in Congress. Senator Mitchell raised the question whether, if the election of senators were put directly in the hands of the people, Congress would not have power, by virtue of that change and

without further amendment of the Constitution, to prescribe the qualifications for electors of senators? Whereupon, Senator Bailey exclaimed: "If that interpretation were correct, and if the mere amendment making the election of senators direct by the people left Congress the power to determine the qualifications of the electors for senators, I would no more support it than I would invite a pestilence."<sup>15</sup>

If, then, the adoption of popular election of senators leads directly to the popular election of President, vice-president, and, it may be, also of federal judges, and if both the qualifications for and the exercise of the suffrage would, in consequence, be subjected to federal control, it would be the height of unwise to take the first step in this path before first deciding whether we are prepared to follow where it inevitably leads.

For, the thoroughgoing democratization of the elective process, by which every one of the departments of the federal government is constituted, may be by no means the most radical consequence which this proposed amendment would entail. It has been earnestly insisted by Senator Hoar and others that, if the election of senators were placed directly in the hands of the people, the equal representation of the States in the Senate would be seriously endangered. Yet, the system of representation thus menaced was a feature most essential to the acceptance and adoption of the Constitution; it has received the tribute of imitation in the constitutions of other states, notably in those of the Swiss Republic, and of the most modern of federal governments, the new Commonwealth of Australia. Nor is

<sup>15</sup> May 5, 1902.

the prospect of a change to a Senate whose members are chosen in proportion to the population of the several States made more attractive, when one recalls how often it has been the most populous States which have sent to the Senate its least desirable members.<sup>16</sup>

In recent years, reverence for the Constitution has suffered a lamentable decline. The attitude of the American people toward the Constitution has passed through strange variations. The anxious debates of the Convention were kept an inviolate secret, in order that the draft of the Constitution might go before the people with all the prestige attaching to the finished product of months of careful work by as able a body of lawmakers as ever faced a grave crisis. Yet, had it been subjected to the immediate verdict of the people, after the manner of a modern referendum, without doubt the Convention's labors would have been promptly rejected. Only after its merits had been given luminous exposition in *The Federalist*, and after its every clause had been subjected to searching criticism in state conventions, was ratification by enough States secured to put the new Constitution into effect. Yet a decade had not passed before party lines were sharply

<sup>16</sup> Dissent from the argument of Senator Hoar has followed two lines: In the first place, it is to be observed that no other provision of the Constitution stands behind such impregnable defenses as does the one in question; for, only with its own consent, may a State be deprived of its equal suffrage in the Senate. Is popular election of senators an earnest of radicalism so thorough-going as to override this provision? But, in the second place, not only the propriety of this barrier, but the supreme value of that which it guards has been questioned. As a matter of history, attempts to exclude forever certain constitutional provisions from amendment have proved of little avail.

drawn, and each party was proclaiming itself the true and only defender of the Constitution. The era of the "worship of the Constitution" had already begun. Down to the time of the Civil War arguments as to the constitutionality of proposed measures commanded the most profound attention. Mr. Bryce has well pointed out that, while this reverence for the Constitution sometimes led to the unfortunate over-emphasis of "lawyer's facts," as compared with "historian's facts," it nevertheless exercised a salutary conservative influence upon our young Americanism by stimulating a wholesome respect for law. But, in recent years, no one can fail to detect a growing restiveness under the restraints of the venerable Constitution. The argument as to constitutionality figures far less prominently in congressional debates and on the stump. Questions as to expediency now occupy the central place, and, with a frankness which is startling when one stops to face it, present-day debates assume that everything else must yield to the people's will, and that what is expedient must suffer but the shortest delay from any hoary Constitution. Amendments are proposed by the score; the inroads of custom are commented upon in jocular vein; political party platforms upbraid the Supreme Court for not interpreting the Constitution to their liking, and a candidate for the presidency virtually announces that, if elected, he will conscientiously use his every opportunity in the appointment of justices of the Supreme Court so as to secure from that august body a decision favorable to the fiscal views of his adherents. It is the period of reaction. The pendulum has doubtless swung too far. Somewhere, between the worshiping of the

Constitution as a fetich and the brushing it aside as a futility, between a hushed acceptance of its every clause as verbally inspired and a rejection of it as an outworn anachronism, will be found that truer appreciation of the vast service which the Constitution has rendered and is yet to render to the American people.

At a time, therefore, when reverence for the Constitution seems seriously impaired, it is not the part of wisdom to force a radical amendment unless it is imperatively demanded by public opinion. It is possible to present the history of the movement in favor of popular elections in such a way as to make the voice of the people seem clarion-clear in its demand for this proposed change. The press teems with editorials favoring it; political parties have indorsed it in their platforms; resolutions urging it come pouring in upon Congress from individuals, societies, and even state legislatures from all over the Union; resolutions providing for taking the initial steps toward the proposed amendment have often been reported favorably in Congress, and five times, by overwhelming majorities, the House has given such an amendment its approval.<sup>17</sup> "Where there is smoke, there must be fire,"—and yet, it is well to remember, also, "how great a matter a *little* fire kindleth!"

In the first place, much of the argument by which the change is advocated is of so heedless and easy-going a character to carry little weight with the discerning. In place of calm reasoning, either from theory or from political experience, there is a surfeit of prophecy as to what "will naturally follow" when once popular elec-

<sup>17</sup> *Supra*, pp. 104, 112.

tion has been attained. As to the multitudinous petitions and memorials, it is to be remembered that there are few things easier than to get signatures to a petition for almost any object under the sun. Americans seem to have a *penchant* for attaching their names to "movements," without too anxious thought as to the issues involved. We like to salve our consciences for not attacking abuses near at hand, by listing ourselves among the advocates of utopian reforms. It is the testimony, too, of many senators that a large number of the resolutions, favoring election of senators by the direct vote of the people, which flood Congress, bear evidence of coming from a common source, and of being, thus, a part of a propaganda actively promoted by a few enthusiasts, rather than proof of an irresistible movement springing spontaneously from the people themselves throughout the country.

But the votes in Congress are a matter of record. In every instance, the majority in the House has been overwhelming; twice the vote was unanimous. Yet certain important facts do not appear upon the surface. The first of these unanimous votes in favor of this radical amendment followed upon no discussion whatever in the House, both the friends and the foes of the measure tacitly agreeing to shoulder off the whole question upon the Senate as the body principally concerned. Advocates of the measure have again and again bewailed the lack of interest in it—that at the sessions when it was under discussion they "spoke to empty seats," that "barely forty members were present." Speaker Reed characterized the debate in the House as a "farce," the discussion of a change of momentous importance being

crowded into a part of two days, and participated in by only a few; as an expression of public opinion, he declared it worthless. Senator Hoar called attention to the fact that the friends of the measure came to the Senate for "the first serious debate upon it," and said that in the House the favoring resolutions, he believed, had been passed "half as a joke." It is true that these strictures come from opponents of the amendment; but an examination of the *Congressional Record* will show that they are not without foundation. Page after page is taken up with rank demagogic, with fervid harangues to prove that the change is necessary to remove the offense which the framers of the Constitution committed by their "distrust of the people." There can be no doubt that the favorable votes in the House are significant, less of the candid opinions of the representatives than of their surmise of what might prove of vote-getting value among their constituents. In every case, there was absolute certainty that the Senate would not concur in the proposal of the amendment, and hence that not the slightest responsibility attached to this vote in the House. But, if the representatives assumed that the demand for the amendment had any serious popular backing, the vote upon it afforded an opportunity to put the onus of unpopularity upon the Senate, while the individual congressman got his name upon record as voting in favor of "trusting the people." The constant iteration of this phrase in the House debates gives rise to the suspicion that, by assuring the people of "Jaalam P'int" over and over again that they ought to be and shall be trusted, the fervid orator would fain impress them with an unwavering belief that he is,

of all men, the one for them to trust. It was a member of the House who declared: "This proposition of an amendment for popular elections of senators is an old and familiar soldier here. It has served the purpose many times of members squaring themselves with constituents, and is going to serve the same purpose again. It is suggested by a friend near me that it be put upon the pension roll. It has done great and valiant service for a great many gentlemen."<sup>18</sup>

Even in the Senate, where the debates on this subject have been directed less to the gallery and to the press, when members take no pains to call up the proposed amendment until the very closing days of the session, after all possibility of action upon it is past, the query is warranted whether their long arguments aim to convert their skeptical colleagues, or rather to make an impression upon their constituents in the West. Despite the persistent efforts of three senators and of half a dozen members of the House, Congress has as yet failed to take this matter seriously. Until those who advocate this amendment make convincing their seriousness and conscientiousness of purpose, and until they enlist in their cause a public sentiment which will lead the rank and file of the people to accept the popular election of senators as a duty to be exercised with discrimination and independence, rather than as a novelty with which they fancy they would enjoy experimenting under the direction of the party bosses, little advantage is to be anticipated from the proposed change.

<sup>18</sup> Jerry Simpson, in *Congressional Record*, Vol. 31, p. 4817 (May 11, 1898).

## CHAPTER XI

### CONCLUSION

How senators shall be chosen, has become a question which the people of the United States must frankly face. For, that the phrases of the Constitution have long since ceased accurately to describe, still less to determine, the process of their election, no one can doubt who has noted how senators in recent years have reached their office, or who has grasped the import of the movement, which, during the past thirty years, has taken on different forms, has employed different means and methods, but has ever kept the same spirit and aim—a determination that the Senate of the United States shall be made responsible to the people.

The route first attempted was by way of an amendment to the Constitution, providing for the election of senators by the direct vote of the people. Only under urgent prompting from outside did Congress accord much attention to this project; for years it received little more than perfunctory lip-service; yet, so insistent became the demand, that five times and by ever-increasing majorities, the House of Representatives has passed a resolution proposing such an amendment.<sup>1</sup> But all progress toward the goal by this route has always been blocked by the Senate's stolid resistance. In despair

<sup>1</sup> *Supra*, p. 104.

of success upon this line, recourse has been had to the optional, but hitherto untried method of proposing amendments: state legislatures have been calling upon Congress to summon a convention for the express purpose of initiating this amendment. In one form or another, the legislatures of thirty-one States—more than the full two-thirds prescribed by the Constitution—have communicated to Congress their formal approval of the proposed change in the Constitution; indeed, if the votes in the House be taken as a fair representation of the will of the people in their constituencies, then only two States in the Union have failed to give their indorsement. Along this line, then, the movement<sup>1</sup> has reached a point where it needs but the putting of these requests into a common form and the marshaling of this scattering fire of resolutions into one concerted volley of demand, to constitute a mandate which the Constitution gives Congress no warrant but to heed. That the House would offer no obstruction, every precedent makes clear. Would the Senate still demur, and thus invite disaster upon itself?

Meantime, a vast deal of ingenuity has been devoted to attempts to reach popular control of senatorial elections by some other route than the amending of the Constitution. While the form of election by the legislature is retained, its spirit has been radically changed. There is not a State in the Union to-day where members of the legislature proceed to the election of a senator with that enlightened independence, that freedom of individual discretion in the choice, from which the fathers anticipated such beneficent results. Every-

<sup>1</sup> *Supra*, p. 114.

where the legislators approach the task under the dominance of party, and in every State where one well-disciplined party is in power, the result of the election is a certainty even before the legislature convenes. Not only has party spirit claimed this election for its own, but the party's choice for senator is often made before the members of the legislature are elected, and is obtruded upon that body by the state convention. Already, in about a third of the States, either under party rules, or in accordance with the explicit provisions of state law, direct primaries name the candidates, and wherever a strong party is supreme, this nomination is tantamount to an election. Even in the most conservative States, the movement for the direct primary is making distinct progress. In four States, provision is made for a popular "election," carried out under the supervision of officials, not of the party, but of the State; an election as complete in all its details and formalities as is that of the governor, yet which is as void of legal power to bind the legislature in the real election of senator as would be the resolutions adopted by a boys' debating society.

What, then, is the outcome to be? That depends not a little upon the temper and action of the Senate itself. If senators have foresight enough to discern the cloud while it is yet but the size of a man's hand, the gathering tempest of discontent may be averted. For, in comparison with a rule-ridden House that has ceased to be a deliberative body, a Senate that gave evidence of feeling itself responsible to public opinion, and of striving to discover and serve the country's broader interests, might so win the people's confidence that agitation

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for change in its mode of election would lose its force. But is legislative election under present conditions calculated to yield a Senate capable of such self-regeneration? If, on the other hand, the Senate continues for a few years more arrogantly to refuse the people an opportunity to pass upon the mode of their election; if, meantime, relying upon the impregnable defenses built about their office by legislative election, senators persist in neglecting or perverting measures of the utmost public concern, while not a few of them are devoting their best energies to the protection of private interests; if state legislatures, heedless of the earnest and manifold efforts made by the people to bring them to a sense of their high responsibility to the State in the selection of senators, persist in using their legal freedom of choice, not for the selection of the best men, but of men whose presence in the Senate is a disgrace to the State and a menace to popular government—then the new century will still be young when the people will find themselves forced to make choice between two alternatives: either they must redouble their efforts to force the new wine of democracy into the old bottles of the elective process prescribed by the Constitution, or, frankly casting aside that ancient mode of election as outworn, for better, for worse, they must take the choice of senators into their own eager, strong, but unskilled hands.

But the teaching of both theory and experience is that, without amendment of the Constitution, genuine popular control over senatorial elections cannot be effectively realized.<sup>3</sup> It needs no repetition of such

<sup>3</sup> *Supra*, pp. 148-149.

experiences as the Oregon fiasco of 1903 to afford convincing proof that the indorsement of senatorial candidates by state conventions, their nomination by direct primaries, even their "election" by an overwhelming majority of the vote of the people, may count absolutely for naught in influencing the real election at the hands of a legislature ruled by party bosses, or rent by factions which this very election has brought into being. In the very States where popular control of senatorial elections is most needed, the best laid schemes for its realization have proved futile.

It is said that, during the debate of a great public issue, an opponent once reproached Charles Sumner for not having considered the other side of the question. "The other side!" was Sumner's scathing retort. "There *is* no other side!" But rare indeed are the questions upon which the sane statesman, publicist or citizen can pass such sweeping judgment. The choice between political institutions or methods almost never presents itself as a choice between the absolutely good and the absolutely bad; it is, rather, the selection of the one which gives promise of yielding the greatest surplus of good. Whether it would be best to substitute for legislative election the choice of Senators by the direct vote of the people, is emphatically a question where arguments of strength and validity may be advanced on both sides; and each man's decision must be reached by estimating the net surplus of advantage involved in the elective process to which he accords his preference.<sup>4</sup> In earlier pages, the writer has attempted

<sup>4</sup> That the question is by no means one-sided is illustrated by the fact that out of the five close observers of the Senate whose

to set forth as fairly and sympathetically as he could the considerations which weigh most heavily on the one side and on the other; but he has not been in doubt as to the dip of the balance.

If effective popular control over senatorial elections is to be won only by amending the Constitution so as to make possible the choice of senators by direct vote of the people, would the gains from popular elections, thus secured, outweigh the losses? In the writer's opinion, the answer must be yes.

Few will be inclined to dispute that the Senate, as at present constituted, has become a seriously discredited body, and that many of its members show not a trace of any feeling of responsibility to the people. If, entirely aside from any experience with our Senate, the question could arise afresh as to the best method of electing the members of an upper house of

consensus of opinion upon its personnel has been quoted above, three are gravely doubtful if, on the whole, gain would result from placing the election of senators in the hands of the people. Even the man who ascribes the presence in the upper house of thirty senators—one out of every three—to their being representatives satisfactory to corporate wealth, or the "System," and who believes that five more owe their seats chiefly to their great wealth, and five more to their skill as politicians of the baser sort—even he is most pronounced in favoring the retention of the present system. He writes: "I have seen enough of the haste, the demagoguery, the petty time-serving propositions of the House of Representatives, fresh as it is from the people, and enough of the care-taking, the sagacity and the self-respect of the Senate as a body, to leave me no room to hesitate in measurement of the comparative worthiness of the two houses." But, to the writer, it seems that these contrasts are to be attributed primarily to differences in the size of the houses, and in the term of office, rather than in the mode of election.

the national legislature, in these early years of the twentieth century, no thoughtful man in the country would think of devolving that duty upon the state legislatures. Many explanations may be set forth why this disposition was made of the election in 1787. It may be urged with force that many advantages are to be expected from an election by small bodies of picked men, and not a few objections may be advanced to amending the Constitution. Nevertheless, the man of to-day would feel instinctively that the state legislatures were unsuited to the performance of such a function, both by the conditions of their election and by the nature of their normal work of legislation. Or—to vary the hypothesis—if we had to-day a popularly elected Senate which proved subject to all the evils which are predicted from popular elections, not one thoughtful man in a thousand would be found who would suggest that election by state legislatures would afford the needed remedy. The defense of legislative election of senators comes in large part from those who identify loyalty to constitutional government with veneration, not for the spirit, but for the letter of our ancient Constitution, just as some very worthy people identify pure religion and undefiled, with a fervent belief in the verbal inspiration of the King James version of the Bible. It is true, that change of the Constitution is not to be entered upon flippantly; but if one of its provisions perpetuates an elective process which has come to work in utterly different spirit and with results directly antagonistic to those which the fathers sought to attain, it is the part of true conservatism to set about amending the section which experience has proved thus defective.

rather than disingenuously to preserve its letter, while putting forward cunning and intricate devices to reverse its spirit and effect. It is absurd to maintain that true reverence for the Constitution is better fostered by such laws as those of Mississippi, or of Oregon, aiming to secure *de facto*, though not *de jure*, popular elections, than by straightforward and manly amendment of the Constitution.

Beyond question, there has been not a little demagogic and lip-service in the advocacy of the election of senators by the direct vote of the people.<sup>5</sup> Nevertheless, this movement has back of it the weight of public opinion. The evidence is to be found, not merely in the resolutions of societies and legislatures, in the platforms of political parties and in the debates of Congress. It is to be found in the outspoken editorials of journals which stand for genuine conservatism and in the grave apprehension with which thoughtful men the country over view the present elective process and its results.

The grounds which the framers of the Constitution advanced for their belief that the election of senators by legislatures would produce beneficent effects upon the Senate as a lawmaking body have for the most part become obsolete. Legislative election in other departments has passed entirely out of vogue and out of practice. It was not to be thought of that the framers of the constitution in the latest great federal state, the Australian Commonwealth, would follow ancient American precedent in this regard. If it is claimed that the change to popular election would remove a great bulwark against centralization in the organized

<sup>5</sup> *Supra*, p. 258.

resistance of the state legislatures, the reply is that no other influence has conduced so directly to the subordination of state and local government to the national party organizations as has this process of electing senators, and legislatures thus dominated are little likely to impose sentiments opposed to centralization upon the senators of their choice. The protest that under popular elections the Senate would fail to secure representation of the States as such, is academic and fallacious. The state legislature is but the agent; the body of voters, the principal. The governor personifies the State in most of its dealings with other States and with the national government; he certainly is no less the representative of the State by virtue of his deriving his authority directly from the people than he would be if he were elected by the legislature. No logical principle underlies the assumption that only election by the legislature can authorize a man to represent the statehood of Massachusetts, or of New York, in the Senate of the United States.

As to the improvement which popular election would bring to the quality of the Senate, it is best not to entertain too optimistic anticipations. It cannot be denied that the lowering of the tone in the Senate in recent years is not to be attributed solely to the method of election—which in form has remained unchanged—but to general influences which have lowered and commercialized American politics throughout the system. Popular elections would present no insuperable barrier to the demagogue and to the corruptionist. Indeed, it is a debatable question, whether he would not find his path easier and more direct than at present. More-

over, the shortening of senatorial careers—which the history of other elective offices shows would be an almost inevitable consequence of popular election—would tend seriously to impair the Senate's prestige and power. The chief grounds for hope that popular election would, nevertheless, improve the tone of the Senate are three: (1) No candidate could secure the election unless he possessed the confidence and could enlist the support of a plurality at least of all those sufficiently interested to take part in a great national election. (2) In the openness of the direct primary, and in the publicity for the weeks preceding a popular election, the people would have ample opportunity for passing a far more correct judgment upon senatorial candidates, than is possible in the murky atmosphere which often surrounds an election in the legislature. At present, the case is closed as soon as a candidate, who may never have been thought of before, can negotiate a majority from some few score of legislators; under popular elections every candidate's record and qualifications would be under discussion for weeks before the election, and if the popular verdict proved to be not in accord with the evidence, the blame could be shifted by the voters upon no one else. (3) Although the phrase-maker, the demagogue, or even the corruptionist or corporation tool, might capture a seat in the Senate, democracy would learn valuable lessons from such betrayals of confidence, and would correct its mistakes with more promptness and permanence than would a state legislature.

The decisive advantages of the change to popular election of senators, however, would be found in its

ffects, not upon the federal government, but upon the individual States. However plausibly the apologist for the present system may argue that this very method of election by legislatures has remained unchanged since the time when it produced ideal results, and that, therefore, the causes of the present abuses must lie deeper than the mere mode of election, he cannot deny that our state legislatures have sunk to a deplorably low level, and that one of the most potent causes of this deterioration which has unfitted the legislatures for the performance of this function, by what may seem like a paradox, has been the very exercise of it. The fact that this election of an important federal official is devolved upon the members of the state legislature blurs the issues in the voter's mind, distorts his political perspective, makes him tolerant of much inefficient legislative service on the part of the man who will vote for his party's candidate for the Senate. To the legislature, as a body, it brings what is liable at any time to prove a task as difficult and distracting as it is incongruous with normal legislative work; to the State it brings interruption, it may be prevention, of needed legislation, the domination of all issues by the national political parties and the tyranny of the boss, who almost inevitably seeks to impose either some tool or his own venal, or, at best, narrowly partisan self upon the commonwealth, as the "representative of its statehood" in the United States Senate. To be rid of this would be an achievement well worth the struggle, the earnest of far greater progress in the future.

Mr. Birrell recalls Sir Daniel Ramsay's reply to Lord Rea: "Then said his lordship: 'Well, God mend all!'

‘Nay, by God, Donald, we must help Him to mend it!’” Never before has the opinion been so widespread that the Senate is sadly in need of mending, that the mending will never be done by the Senate itself, nor by the state legislatures, but that it can only be accomplished when the people, in self-reliant, manly fashion, help to mend it by taking the election of senators into their own hands.

## APPENDIX I.

### *Resolutions Favoring Popular Elections of Senators, passed by the House of Representatives.*

A. PASSED, JANUARY 16, 1893.\*

Joint resolution (H. Res. 90) proposing an amendment to the Constitution providing that senators shall be elected by the people of the several States.

*Resolved*, etc. (two-thirds of each House concurring therein), That in lieu of the first paragraph of section 3 of Article I. of the Constitution of the United States, and in lieu of so much of paragraph 2 of the same section as relates to the filling of vacancies, and in lieu of all of paragraph 1 of section 4 of said Article I., in so far as the same relates to any authority in Congress to make or alter regulations as to the times or manner of holding elections for senators, the following be proposed as an amendment to the Constitution, which shall be valid to all intents and purposes as part of the Constitution when ratified by the legislatures of three-fourths of the States:

"The Senate of the United States shall be composed of two senators from each State, elected from the State at large, by the people thereof, for six years; and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"The times, places and manner of holding elections for senators shall be prescribed in each State by the legislature thereof.

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature

\* There was no division upon this resolution; it was declared passed, two-thirds having voted in its favor.

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of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as a part of the Constitution."

B. PASSED, JULY 7, 1894.\*

Joint resolution (H. Res. 20) proposing an amendment to the Constitution providing that senators shall be elected by the people of the United States.

*Resolved*, By the Senate and the House of Representatives . . .

"The Senate of the United States shall be composed of two senators from each State, elected by the people thereof, at large, for six years, and each senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"The times, places and manner of holding elections for senators shall be as prescribed in each State by the legislature thereof.

"When vacancies happen in the representation of any State in the Senate, the executive authority of such State shall issue writs of election to fill such vacancies: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the people fill the vacancies by election, as the legislature may direct.

"This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as a part of the Constitution."

C. PASSED, MAY 11, 1898.

Joint resolution (H. Res. 5).

"The Senate of the United States shall be composed of two senators from each State, chosen for six years, and each senator shall have one vote. These [senators shall be chosen by the legislatures of the several States unless the people of any State, either through their legislature or by the constitution of the State, shall provide for the election of United States senators by the

\* The vote upon this resolution was recorded as follows: Yeas, 141; Nays, 50; Answered "Present," 2; Not voting, 158.

direct vote of the people; then, in such case] United States senators shall be elected [in such States] at large by direct vote of the people; a plurality shall elect, and the electors shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"When vacancies happen, by resignation or otherwise, in the representation of any State in the Senate, the same shall be filled for the unexpired term thereof in the same manner as provided for the election of senators in paragraph 1: *Provided*, That the legislature of any State may empower the executive thereof to make temporary appointments until the next general election, in accordance with the statutes or constitution of such State.

"This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as a part of the Constitution." \*

D. PASSED, APRIL 12, 1900.

Joint resolution. (Substitute for H. J. Res. 28.)

"The Senate of the United States shall be composed of two senators from each State, who shall be elected by a direct vote of the people thereof for a term of six years, and each senator shall have one vote. A plurality of the votes cast for candidates for senator shall be sufficient to elect. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the state legislatures, respectively.

"When a vacancy happens, by death, resignation or otherwise, in the representation of any State in the Senate, the same shall be filled for the unexpired term thereof in the same manner as is provided for the election of senators in paragraph 1: *Provided*, That the executive thereof may make temporary appointments until the next general or special election, in accordance with the statutes or constitution of each State.

"This amendment shall not be so construed as to affect the

\* Before the final vote upon this resolution, the parts inclosed had been stricken out, in accordance with an amendment proposed by Mr. Underwood. This amendment removed the much discussed "option," and reduced the amendment to a simple provision for popular election.

The vote upon the resolution, thus amended, was as follows: Yeas, 125; Nays, 11; "Present," 10; Not voting, 149.

election or term of any senator chosen before it becomes valid as a part of the Constitution." \*

E. PASSED, FEBRUARY 13, 1902.†

Joint resolution.

"The Senate of the United States shall be composed of two senators from each State who shall be elected by a direct vote of the people thereof, for a term of six years, and each senator shall have one vote; a plurality of the votes cast for candidates for senator shall elect, and the electors shall have the qualifications requisite for electors of the most numerous branch of the state legislature.

"When vacancies happen, by resignation or otherwise, in the representation of any State in the Senate, the same shall be filled for the unexpired term thereof in the same manner as is provided for the election of senators in paragraph 1: *Provided*, That the executive thereof shall make temporary appointment until the next general or special election held in accordance with the statutes or constitution of such State.

"This amendment shall not be so construed as to affect the election or term of any senator chosen before it becomes valid as a part of the Constitution."

\* As reported from the Committee on the Election of President, Vice-President and Representatives in Congress, the joint resolution was a duplicate of that of 1898, before it was amended, *i. e.*, it made provision for the "option." This substitute, as given above, was offered as an amendment by Mr. Rucker.

The vote upon the resolution was as follows: Yeas, 242; Nays, 15; "Present," 4; Not voting, 89.

† This resolution was "passed (two-thirds voting in favor thereof)."

## APPENDIX II

*Recommendations of the Pennsylvania joint committee, appointed in 1899 "to confer with the legislatures of other States regarding the election of United States senators by popular vote."*

1. The adoption of the resolution hereto attached requesting Congress to call a convention for the amendment of the Constitution in accordance with Article V. of the Constitution.
2. That a standing committee of the legislature be created, entitled committee for the purpose of securing an amendment to the United States Constitution, which shall provide for the election of United States senators by popular vote, who shall take charge of this matter, not only during sessions of the legislature, but during the intervals thereof.
3. That a clerk or secretary of such committee be appointed by the secretary of the commonwealth with an adequate salary, whose duty shall be to confer with the governors and secretaries of state of all the States of the Union, as well as with the members of the state legislature and members of Congress, in relation to this matter.
4. The passage of an Act of Assembly which shall provide that anyone elected a member of the United States Senate from Pennsylvania shall pledge himself to support and vote for the submission to the state legislatures of an amendment to the Constitution of the United States, which shall provide for the election of United States senators by popular vote.

The following resolution, recommended by the Pennsylvania committee of 1899, has served as the model for the resolutions since then adopted by many state legislatures.

### *Resolution*

**Requesting Congress to call a convention for the purpose of proposing an amendment to the Constitution of the United States, which amendment shall provide for the election of United States senators by direct vote of the people.**

WHEREAS, a large number of state legislatures have at various times adopted memorials and resolutions in favor of election of United States senators by popular vote; and

WHEREAS, The national House of Representatives has on four (five) separate occasions, within recent years, adopted resolutions in favor of this proposed change in the method of electing United States senators which were not adopted by the Senate; and

WHEREAS, Article V. of the Constitution of the United States provides that Congress, on the application of the legislatures of two-thirds of the several States, shall call a convention for proposing amendments.

And, believing there is a general desire upon the part of the citizens of the State of Pennsylvania that the United States senators should be elected by a direct vote of the people,

*Therefore, be it Resolved* (if the Senate concur), that the legislature of the State of Pennsylvania favors the adoption of an amendment to the Constitution which shall provide for the election of United States senators by popular vote, and joins with other States of the Union in respectfully requesting that a convention be called for the purpose of proposing an amendment to the Constitution of the United States, as provided for in Article V. of the said Constitution, which amendment shall provide for a change in the present method of electing United States senators, so that they can be chosen in each State by a direct vote of the people.

*Resolved*, That a copy of this joint resolution and application to Congress for the calling of a convention be sent to the secretary of state of each of the United States, and that a similar copy be sent to the president of the United States Senate and the speaker of the House of Representatives.

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